10433

(18,638.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 108.

JAMES G. JAMES, APPELLANT,

vs.

GEORGE H. APPEL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

	Original.	Print.
Caption.....(omitted in printing)..	a	—
Abstract of record from district court.....	1	1
Second amended complaint.....	1	1
Exhibit A—Agreement between J. G. James and George H. Appel, December 18, 1895.....	12	8
Demurrer and answer to complaint. ...(omitted in printing)..	17	—
Special demurrer to answer.....(" ")..	30	—
Amended answer.....	30	10
Demurrer to amended answer.....(omitted in printing)..	38	—
Opinion.....(" ")..	41	—
Findings of fact.....	46	14
Conclusions of law.....	49	16
Decree.....	49	16
Motion for new trial.....	50	17
Order continuing cause.....	51	18
Motion to vacate order of continuance, with notice (omitted in printing).....	52	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 7, 1903.

	Original.	Print
Motion to vacate order of continuance, with notice (omitted in printing)	53	—
Motion to vacate order of continuance, with notice (omitted in printing)	54	—
Order on plaintiff to give bond (omitted in printing)	55	—
Order setting cause for trial by jury (" ")	55	—
Order of continuance by agreement (" ")	55	—
Order setting cause for trial by jury (" ")	56	—
Order overruling demurrer to complaint (omitted in printing)	56	—
Order beginning hearing on motion for judgment (omitted in printing)	56	—
Order taking motion for judgment under advisement (omitted in printing)	56	—
Order entering C. W. Wright as counsel for defendant (omitted in printing)	57	—
Order denying motion for judgment (omitted in printing)	57	—
Order overruling special demurrer to answer (omitted in printing)	57	—
Order overruling motion to try without jury (omitted in printing)	57	—
Order to begin trial before jury (omitted in printing)	57	—
Orders continuing trial (" ")	58	—
Orders concluding trial, &c (" ")	61	—
Order discharging jury and continuing cause (omitted in printing)	62	—
Order continuing cause (omitted in printing)	62	—
Order setting cause for trial (" ")	62	—
Order passing cause (" ")	62	—
Order continuing cause (" ")	63	—
Order setting cause for trial (" ")	63	—
Order assigning Judge Street to hear cause (omitted in printing)	63	—
Order beginning trial without jury (omitted in printing)	64	—
Orders continuing trial without jury (" ")	64	—
Order concluding trial without jury (" ")	65	—
Order to enter judgment of record (" ")	66	—
Order as to jury fee (" ")	67	—
Orders continuing motion for new trial	67	18
Order denying motion for new trial, &c	68	18
Clerk's certificate to minute entries (omitted in printing)	69	—
Abstract of court reporter's transcript of testimony, &c. (omitted in printing)	70	—
Offers of exhibits by plaintiff (omitted in printing)	70	—
Testimony of Frank H. Hereford (" ")	70	—
Offers of exhibits by plaintiff (" ")	74	—
Testimony of George P. Scholefield (" ")	75	—
S. M. Franklin (" ")	78	—
C. F. Schumacher (" ")	82	—
James G. James (" ")	85	—
Offers of exhibits by plaintiff (" ")	86	—
Deposition of George H. Appel (" ")	86	—
Plaintiff rests (" ")	94	—

INDEX.

	Original.	Print
Ruling by the court.....(omitted in printing)..	94	—
Offers of exhibits by defendant....(" ")..	95	—
Testimony of James G. James.....(" ")..	96	—
Albert Steinfeld.....(" ")..	119	—
Frank H. Hereford..(" ")..	120	—
Deposition of Walker C. Graves...(" ")..	122	—
Plaintiff's Exhibit No. A[1]—Mortgage, July 28, 1894 (omitted in printing)....	124	—
No. A[2]—Certified copy of brand (omitted in printing).	127	—
No. A[3]—Note, July 28, 1894 (omitted in printing)	127	—
No. A[4]—Agreement, December 18, 1895 (omitted in printing).....	128	—
No. A[5]—Order of sale in Hilzinger case (omitted in printing).....	132	—
No. A[6]—Attachment and sheriff's return in Hilzinger case (omitted in printing).....	137	—
No. A[7]—Order of sale, &c., in Hilzinger case (omitted in printing) ...	142	—
No. A[8]—Letter, Graves to Appel, Dec. 20, 1895 (omitted in printing).	148	—
No. A[9]—Letter, James to King, January 7, 1896 (omitted in printing).	148	—
No. A[10]—Letter, James to King, March 18, 1896 (omitted in printing).	149	—
No. A[11]—Letter, James to Appel, Feb. 24, 1896 (omitted in printing).	150	—
No. A[12]—Letter, James to Appel, May 18, 1896 (omitted in printing)...	151	—
No. A[13]—Letter, James to Appel, June 16, 1896 (omitted in printing)...	153	—
No. A[14]—Letter, James to Appel, June 16, 1896 (omitted in printing)...	154	—
No. A[15]—Letter, James to Appel, July 1, 1896 (omitted in printing)...	157	—
Letter, King to James, June 25, 1896 (omitted in printing)...	159	—
No. A[16]—Letter, James to Appel, January 20, 1897 (omitted in printing).	160	—
No. A[17]—Telegram, Proctor to James, June 9, 1896 (omitted in printing)	162	—
No. A[18]—Letter, James to King, March 2, 1896 (omitted in printing)...	163	—
No. A[19]—Letter, Buell to Appel, February 9, 1897 (omitted in printing)..	163	—
Letter, James to Appel, Feb. 9, 1897 (omitted in printing).	164	—
No. A[20]—Letter, James to King, May 14, 1896 (omitted in printing)...	167	—

	Original.	Print
Plaintiff's Exhibit No. A[31]—Certified copy of brand (omitted in printing)	168	—
No. A[32]—Letter, James to King, October 6, 1895 (omitted in printing)	168	—
No. A[33]—Certified copy of brand (omitted in printing)	170	—
No. A[34]—Letter, Appel to Hereford, Dec. 18, 1895 (omitted in printing)	170	—
Defendant's Exhibit B[1]—Letter, James to Appel, March 16, 1897 (omitted in printing)	171	—
B[2]—Statement of account (omitted in printing)	173	—
B[3]—Letter, Appel to James, December 10, 1895 (omitted in printing)	186	—
Letter, Appel to Hemme, Dec. 12, 1895 (omitted in printing)	186	—
Letter, Appel to James, December 23, 1895 (omitted in printing)	188	—
Letter, Appel to James, January 13, 1896 (omitted in printing)	188	—
Letter, Appel to James, January 18, 1896 (omitted in printing)	189	—
Letter, Appel to James, February 21, 1896 (omitted in printing)	189	—
Letter, Appel to James, May 12, 1896 (omitted in printing)	190	—
Letter, Appel to James, June 4, 1896 (omitted in printing)	190	—
Letter, Appel to James, June 4, 1896 (omitted in printing)	191	—
Letter, Appel to James, June 9, 1896 (omitted in printing)	192	—
Letter, Appel to James, June 11, 1896 (omitted in printing)	193	—
Letter, Appel to James, July 1, 1896 (omitted in printing)	193	—
Letter, Appel to James, July 27, 1896 (omitted in printing)	194	—
Letter, Appel to James, July 10, 1896 (omitted in printing)	196	—
Letter, Appel to James, August 1, 1896 (omitted in printing)	197	—
Letter, Appel to James, January 25, 1897 (omitted in printing)	197	—
Letter, Appel to James, March 20, 1897 (omitted in printing)	199	—
Letter, Appel to James, February 22, 1897 (omitted in printing)	200	—
Letter, Appel to James, April 19, 1897 (omitted in printing)	201	—
Letter, Appel to James, March 22, 1897 (omitted in printing)	201	—

INDEX.

	Original.	Print
Motion to dismiss appeal	203	19
Order submitting motion to dismiss	207	22
Judgment	207	22
Cost bill	208	22
Assignment of errors	209	23
Petition for appeal	211	24
Order allowing appeal	212	24
Certified statement of facts	213	25
Bond on appeal	217	27
Clerk's certificate	220	29
Citation	221	29
Proof of service of citation	223	30
Statement of errors upon which appellant intends to rely	226	31
Designation of parts of record to be printed	228	32
Proof of service	229	33

a-1 In the Supreme Court of the Territory of Arizona.

Abstract of Record.

In the District Court of the First Judicial District, Territory of Arizona, in and for the County of Pima.

GEORGE H. APPEL, Plaintiff,
vs.
JAMES G. JAMES, Defendant. } No. 2579.

Second Amended Complaint.

Now comes the plaintiff herein, and amending his complaint for cause of action, alleges:

I.

That the plaintiff is a resident of the county of Pima, Arizona Territory, and that the defendant is a resident of the city and county of San Francisco, State of California.

II.

That on the 28th day of July, 1894, the Baboquivari Land and Cattle Co., a corporation, made and delivered its promissory
2 note, for value, to Minerva E. Hemme, payable one (1) day after date to the said Minerva E. Hemme, or order, in the sum of fifty thousand dollars ($50,000) with interest on the said note from date hereof, at the rate of seven (7) per cent. per annum. That at the time of executing the said promissory note, the said corporation for the purpose of securing the payment thereof, executed a chattel mortgage whereby the said corporation mortgaged to the said Minerva E. Hemme about five thousand (5,000) head of cattle and eight hundred (800) head of horses, ranging in Pima county, Arizona Territory, near the ranch of the said Baboquivari Land and Cattle Company, which said cattle and horses were branded with a brand known as the "Club" brand, and were then and there the property of the said Baboquivari Land and Cattle Company. That the said Club brand was duly recorded in the office of the county recorder of the said Pima county. That in the said mortgage were duly set out the residence of the mortgagee and mortgagor, the sum to be secured, the rate of interest to be paid, when and where payable, and that the said mortgage was duly verified and acknowledged, and in all these and all other respects complied with the requirements of par. 2364 of the Revised Statutes of this Territory. That the said mortgage was on the 27th day of August, 1894, duly deposited and filed in the office of the county recorder of this county, where the said mortgaged property was then situated.

III.

That on the 1st day of December, 1894, the said Minerva E. Hemme, for a valuable consideration, endorsed and transferred the said promissory note and the said chattel mortgage to the
3 plaintiff, who thereby became and ever since has been and now is the holder and owner of said note and mortgage.

IV.

That the said promissory note and the said chattel mortgage are still wholly unpaid, unsatisfied, and undischarged, and that the said note is due.

V.

That on or about the 1st day of January, 1895, while the said mortgage remained unsatisfied, and the lien thereof still attached to the said mortgaged property, all the interest which the said mortgagee had in the said cattle and horses of the Club brand was attempted to be attached in certain suits for debt brought in this honorable court by J. Geo. Hilzinger and Charles T. Etchells, against the said mortgagor, and that on or about April 30th, 1895, judgment was rendered in said suits against said mortgagor. That on or about October 16, 1895, all the right title and interest which the said mortgagor had at the date of the levy of said attachment in and to the said mortgaged cattle and horses was attempted to be sold under the said judgments and orders of sale made in said suits. That the said attempted sale was made to Hugo J. Donau. That thereafter the defendant acquired from the said Donau all the said Donau's right, title and interest, under the said sale in and to the said cattle and horses.

VI.

That thereafter and until the 18th day of December, 1895, the defendant made several attempts to remove the said cattle and horses out of this Territory, and several times instructed his agents so to do, but the plaintiff for the protection of his said mortgage
4 security always prevented such removal, and refused to permit the same until the said note and mortgage had been paid and satisfied, warning the defendant's agents that they would be criminally prosecuted if the said mortgaged property was removed from this county.

VII.

That shortly before and on December 18, 1895, plaintiff and defendant and one, A. Hemme, the president of the said Baboquivari Land and Cattle Company, had several conversations in the State of California, during which the defendant and the said Hemme informed and induced plaintiff to believe that there were running on the range of the Baboquivari Land and Cattle Co., in the said county of Pima, more than five thousand six hundred (5600) head of cattle,

that had been the property of the said Baboquivari Land and Cattle Co., five thousand (5000) of which were subject to the said chattel mortgage of the plaintiff, and also about two thousand (2000) head of cattle branded L Z, which said L Z brand is called and known as the "L Z" brand, and the title to which said brand and to which said cattle was in L. Zeckendorf & Co., a copartnership, doing business in the said county of Pima, composed of Louis Zeckendorf and Albert Steinfeld. Plaintiff was further informed and induced to believe by the defendant and the said Hemme that the said Baboquivari Land and Cattle Company owned an interest in the said two thousand (2000) head of "L Z" cattle, sufficient in value, over and above the interest of the said L. Zeckendorf & Co. therein to pay all or nearly all the indebtedness due or owing by the said Baboquivari Land and Cattle Company on account of the said judgments, orders of sale, and every other kind of indebtedness whatsoever, chargeable to or against any of the cattle which the said Baboquivari Land and Cattle Company, owned or had an interest in, except the amount due plaintiff on his note and chattel mortgage.

VIII.

That the said defendant, J. G. James was a thorough and experienced cattle man, and shortly before the said 18th day of December, 1895, had left California and gone on to the range of the Baboquivari Land and Cattle Co., in the said county of Pima, for the purpose of ascertaining the number of cattle and horses owned and controlled by the said Baboquivari Land and Cattle Co. That the said Hemme was the president of the Baboquivari Land and Cattle Co., and had much experience with cattle, and had frequently been down to the ranch of the Baboquivari Land and Cattle Co., and had ample opportunity to know, and claimed to know the number of cattle owned and controlled by the said Baboquivari Land and Cattle Co. That the said A. Hemme, on behalf of the Baboquivari Land and Cattle Co. was desirous of making terms between the plaintiff and defendant, and the Baboquivari Land and Cattle Co., with the aim and object of saving to the said Baboquivari Land and Cattle Co. part of the cattle herein referred to. That the plaintiff knew nothing about cattle business, horse business, or live-stock ranch business, and had never been on the range of the Baboquivari Land and Cattle Co. nor in Arizona. And plaintiff knew nothing about the L. Z. "Club" or Slipper horses and cattle, or any other of the horses and cattle of the Baboquivari Land and Cattle Co., except as was told him in the said conversations by the said James and by the said Hemme.

IX.

That for the purpose of saving litigation and law fees and expenses to the plaintiff, and of establishing the validity of the lien of his mortgage upon said mortgaged cattle, and relying upon the

representations made by the said defendant, James, the plaintiff was induced on December 18, 1895, to enter into a written agreement with the defendant, James, which recited that the plaintiff had a mortgage upon said cattle, and horses, and wherein the said defendant, James, agreed as a condition precedent to purchase and own all outstanding titles of every character whatsoever, in and to the said cattle and horses, branded with the said "Club" and "Slipper" brands, and to pay all sums due L. Zeckendorf from the Baboquivari Land and Cattle Co. on the said L Z cattle and horses, and to purchase all the right, title and interest of the said L. Zeckendorf & Co. in and to the cattle and horses, branded as aforesaid L Z; and upon the happening and completion of the conditions precedent as aforesaid, the said James agreed to ship two thousand (2000) head, more or less of cattle, branded as aforesaid L Z and to apply the appraised value thereof, which said appraised value was to be ascertained according to the terms of the said agreement, to certain payments, as follows: To repay himself first all the said defendant, James had paid L. Zeckendorf on account of the said cattle and horses, branded L Z as aforesaid, being about the sum of ten thousand dollars ($10,000). Second, to repay the sum or sums paid, or to be paid by the said defendant James to L. Zeckendorf & Co. for, and on account of two (2) certain judgments obtained as aforesaid by the said Hilzinger and the said Etchells, against the said Baboquivari Land and Cattle Co., both together amounting
7 to about the sum of nine thousand dollars ($9000). Third, James was to repay himself all sums of money heretofore advanced by the said James to the said Baboquivari Land and Cattle Co., amounting to about two thousand dollars ($2000). Fourth, the said defendant, James, was to repay all sums that might thereafter be paid by the said James for handling and caring for said horses and cattle; and, fifthly, and lastly, the said James was to pay himself eight and a half per cent. interest per annum from the dates of each of the original payments of the said James until the full amount that had been originally owed or decreed against the Baboquivari Land and Cattle Company, and which said indebtedness had been assumed by the said James, had been paid in full. That should the appraised value of the cattle and horses branded as aforesaid be insufficient to make all the payments provided for as aforesaid, then the said defendant James, was to receive at a value appraised in the same manner, and apply to the said payments, such number of "Club" and "Slipper" cattle and horses as would be necessary to raise the amount of money to complete the payments to be made the said James as aforesaid. And in consideration of the recognition of the validity of his said mortgage lien, and for the purpose of enabling the said defendant to receive and apply upon the said payments, such cattle and horses of the "Club" and "Slipper" brand as might be necessary to complete the said payments, the plaintiff agreed upon the performance of the conditions precedent aforesaid to release from the lien of plaintiff's said chattel mortgage sufficient cattle to enable the defendant by receiving and ap-

plying their appraised value as aforesaid, to repay himself the amount remaining due. But it was expressly agreed and understood
8 that before any "Club" or "Slipper" brand of cattle and horses could be taken, and their value applied as aforesaid, that all the cattle and horses branded L Z should first be purchased, and their appraised value applied to the payments hereinbefore set out to be made the said James, except that the defendant should have the right to take such cattle of the "Club" and "Slipper" brands as were suitable for selling for beef steers, and apply their value to the said payments. That the said agreement was reduced to writing and signed by plaintiff and defendant, and agreed to by the Baboquivari Land and Cattle Co., and a copy of the same is hereto attached, marked "Exhibit A" and referred to as, and made a part of this complaint.

X.

That the said agreement was made and entered into by plaintiff to save the expense, time and annoyance of the long and vexatious litigation that seemed imminent between the plaintiff and defendant, and the Baboquivari Land and Cattle Co., and under the belief induced by the defendant, James, that in addition to the L Z cattle and horses only a few of the "Club" or "Slipper" brand of cattle and horses would be required to complete the said payments, and that the full number of five thousand (5000) cattle would be left on said range to satisfy plaintiff's said cattle mortgage.

XI.

That at the time of executing the said contract the plaintiff had commenced a suit to foreclose his said chattel mortgage upon the said mortgaged property which was then situated in this county, and was about to take possession of the said mortgaged cattle and horses as under the terms of said mortgage he might have done; whereby, his lien would have been enforced and his said note and
9 mortgage satisfied; but that relying upon the representations of the defendant aforesaid, and upon the performance by the defendant of the conditions of the said contract; the plaintiff desisted from prosecuting his said foreclosure suit to effect, and refrained from taking possession of the said mortgaged cattle and horses, as by law he could have done.

XII.

That relying upon the performance by the defendant of the conditions of his said contract, that plaintiff ceased to watch the said mortgaged cattle, to watch the actions of the defendant and his agents as he before had watched them, in order to prevent the removal by the plaintiff of the said mortgaged cattle from this county.

XIII.

That the defendant never intended to carry out the terms of the said agreement, that he made no effort to carry out and did not carry out the conditions precedent to said contract to pay L. Zeckendorf & Co. the amount due said firm from the Baboquivari Land and Cattle Co. for and on account of the L Z cattle and horses, or to procure from the said L. Zeckendorf & Co. all their right, title and interest in and to the said cattle and horses. That by reason of their failure to fulfill the said conditions precedent, the defendant never acquired any right under the said contract or otherwise, to have any of the said mortgaged cattle or horses released from the lien of the plaintiff's mortgage, and that none of said cattle or horses ever were released from said lien, except by their tortious removal from this county by the defendant.

XIV.

That on or about the — day of December, 1896, while the said mortgaged cattle were subject to the lien of plaintiff's said mortgage, the defendant wrongfully, unlawfully and with force, and without the consent of plaintiff, seized, took, shipped and removed out of this county, and out of the Territory of Arizona, and converted to his own use twelve hundred and forty-two (1242) head of said cattle including bulls, steers, cows, heifers, and calves, the greater number thereof not being fit for beef, and whereof eleven hundred and four (1104) were of the cattle subject to the lien of plaintiff's mortgage as aforesaid, and only one hundred and thirty-eight (138) of the said L Z brand.

XV.

That since the execution of said contract, and while the said mortgaged cattle were subject to the lien of the plaintiff's said mortgage, the defendant has wrongfully, unlawfully, with force, and without the consent of plaintiff, seized, taken, shipped and removed out of this county and territory three thousand five hundred (3500) head of said mortgaged cattle, and converted them to his own use.

XVI.

That heretofore, and on the 29th day of October, 1895, the said defendant filed for record a certain brand made as follows **J** as the recorded brand of the said defendant, and thereafter defendant branded as cattle of the **J** brand large numbers of the cattle belonging to the "Club" and "Slipper" brands of cattle, claiming them as his property, whereas the said cattle and all thereof were cattle belonging to the "Club" and "Slipper" brands at the time the chattel mortgage held by plaintiff as aforesaid was made, executed and delivered, and all the said cattle were subject to the said mortgage, and defendant had no right to take or remove them from the county of Pima.

11

XVII.

That the defendant further agreed in and by said written agreement to brand all the calves of the "Club," "Slipper" and L Z brands of cattle in and with the "Club" brand, whereas, in fact the defendant thereafter branded all the calves of the said "Club" and "Slipper" brands with the said J brand.

XVIII.

That after plaintiff learned of defendant's action in shipping out of the said Pima county, eleven hundred and four (1104) head of the cattle of all ages and sexes of the "Club" and "Slipper" brands (part of which had been branded as aforesaid with the alleged J brand) and only one hundred and thirty eight (138) head of the L Z cattle plaintiff refused to acquiesce in or ratify defendant's action and each and all the removals out of the said county of Pima and shipments of the "Club" and "Slipper" cattle, and the "Club" and "Slipper" cattle branded J were against the will, wish and consent of plaintiff, and in defiance of the rights of plaintiff under the law of the Territory of Arizona, and the said chattel mortgage and agreement.

XIX.

That the action of the defendant in thus taking and removing from the said county of Pima, the said number of 3500 head of cattle has wholly lost to plaintiff and deprived plaintiff of his security provided in the said chattel mortgage to secure the said note, by reason of the fact that the defendant gathered and shipped or sold all of the cattle and horses bearing and belonging to the said brands of the "Club," "Slipper" and J brands of cattle. That all of the

12 said cattle and horses were shipped out of the said county of Pima or sold subsequent to the making of the said agreement of December 18, 1895, and up to the time of the filing of this amended complaint. That the reasonable value of the said security for plaintiff's said chattel mortgage, being the said cattle and horses, was at the date of this amended complaint the sum of forty thousand five hundred dollars ($40,500), being the value of thirty-five hundred (3500) head of cattle so shipped as aforesaid, and five hundred (500) head of horses and three hundred (300) head of cattle sold and disposed of and placed beyond the reach of plaintiff by the defendant as aforesaid; whereby plaintiff has been damaged by defendant's wrongful actions in the sum of forty thousand five hundred dollars ($40,500).

XX.

That the Baboquivari Land and Cattle Company, and all parties otherwise liable on said note are insolvent and have been since before January, 1895, and plaintiff has and had no other security for the payment of said promissory note than the said chattel mortgage.

Wherefore, plaintiff prays for the judgment of this court for the sum of forty thousand five hundred dollars ($40,500) and for his costs of suit herein.

FRANK H. HEREFORD,
Attorney for the Plaintiff.

This agreement entered into this 18th day of December, A. D. 1895, between J. G. James, of the city and county of San Francisco, State of California, the party of the first part, and George H. Appel, of the county of Sacramento, State aforesaid, the party of the second part,

Witnesseth: That, whereas, the said Appel is the owner and
13 in possession of a certain note or notes made by the Babaquivari Land and Cattle Company in favor of Minerva E. Hemme, which note or notes subsequently came into the possession of the said Appel, in the ordinary course of business, and which note or notes are secured by a chattel mortgage covering certain personal property, to-wit, cattle and horses situated in the county of Pima, Territory of Arizona, and

Whereas, the said Appel has brought an action to foreclose said chattel mortgage, which action is now pending in the district court of the first judicial district, Pima county, Territory of Arizona, and entitled George H. Appel, plaintiff, *vs.* The Babaquivari Land and Cattle Company, a corporation, Hugo Donau, trustee; J. George Hilzinger, Charles T. Etchells, defendants; and

Whereas, the above named defendants, with the exception of The Babaquivari Land and Cattle Company and Hugo Donau, were the original owners or assignees of the following judgments entered against the Babaquivari Land and Cattle Company in the district court of the first judicial district, Pima county, Territory of Arizona, to-wit:

1st. A judgment in favor of J. George Hilzinger for five thousand one hundred and ninety-one and $\frac{37}{100}$ dollars ($5,197.37) with interest, costs, etc., and against the Babaquivari Land and Cattle Company;

2nd. A judgment in favor of C. T. Etchells for two thousand and one hundred dollars ($2,100.00) with interest, costs, etc., and against the Babaquivari Land and Cattle Company.

Whereas, attachments were issued in the said above entitled suits against the said Babaquivari Land and Cattle Company, and
14 the personal property described in the chattel mortgage above referred to held by the said George H. Appel was attached thereunder, and after judgments were secured in said cases, the said property was sold under the said judgments procured against the Babaquivari Land and Cattle Company; and

Whereas, Hugo Donau became the purchaser at said sale for the sum of two thousand two hundred and fifty dollars ($2250) and a sheriff's certificate and bill of sale was issued to him covering said personal property; and

Whereas, the said J. G. James subsequently purchased from Hugo J. Donau all his right, title and interest in and to said personal

property, to-wit, the cattle and horses branded with the Club and Slipper brand; and

Whereas, the said J. G. James has purchased all the aforesaid personal property and hereby agrees to own and possess the same as a condition precedent to the fulfilling of the terms of this contract; and

Whereas, the said J. G. James, also agrees, as a condition precedent, to pay L. Zeckendorf & Company an amount due said company from the said Babaquivari Land and Cattle Company, for and on account of all cattle and horses branded L Z and now running with the Ace of Clubs brand of cattle in Pima county, Territory of Arizona, on the range known and designated as the Babaquivari Land and Cattle Company range, lying between Poso Bueno and Arivaca and in the vicinity thereof and to procure from the said L. Zeckendorf & Company all their right, title and interest in and to said cattle and horses so branded by the L Z brand, and which cattle are now upon the range of the Babaquivari Land and Cattle Company;

Now, therefore, it is hereby agreed that the said George H.
15 Appel will release or cause to be released, sufficient of the cattle and horses described in said chattel mortgage to repay the said J. G. James the money paid to L. Zeckendorf & Company by J. G. James, on account of the said cattle and horses branded L Z, and the money paid to L. Zeckendorf & Company by the said J. G. James for and on account of two certain judgments obtained against the Babaquivari Land and Cattle Company (a corporation) in the district court of the first judicial district of the Territory of Arizona, one in favor of George Hilzinger and one in favor of C. T. Etchells and all sums and costs of money heretofore paid by J. G. James and which may hereafter be paid by him on account of said judgments, and all sums of money heretofore advanced by the said J. G. James to the said Babaquivari Land and Cattle Company and all sums of money that may hereafter be paid by him for handling, caring for said cattle and horses, with interest on all such sums at the rate of 8½ per cent. per annum from dates of each payment until paid.

That the manner of estimating the value of the said cattle shall be as follows: At any time before April 1st, 1896, the said J. G. James and the said George H. Appel will each select an appraiser, these appraisers shall place a value upon said cattle and horses per head; a sufficient number of said cattle and horses must be appraised to repay the said J. G. James the moneys paid out by him as aforesaid and the claim of L. Zeckendorf & Company to the cattle and horses branded with the L Z brand, and it is understood that the L Z brand of cattle shall first be taken and exhausted as near as practicable. At the same time taking such cattle of the Clubs and Slipper brands as may be suitable for beef, and the appraisement of all said cattle and horses shall be made and the
16–29 same delivered to the said J. G. James on the ranch or at Tucson, Territory of Arizona, and the same shall be and become the property of the said J. G. James and the said J. G.

James shall receive the same at their appraised value as aforesaid and give credit on the sums paid out by him at such appraised value from time to time until he is fully paid.

If the said two appraisers so selected by the parties to this contract are unable to agree upon the value of said cattle, then said two appraisers are required to select a third appraiser, and the three said appraisers, by a majority vote, shall fix the value of said cattle.

It is further stipulated and agreed by and between the parties hereto that the said J. G. James shall have to the first day of January, 1897, in which to perform on his part. All calves of the Club (✠), Slipper (⊂⊃), and L Z ($\frac{L}{Z}$) cattle to be branded with the Club (✠).

Witness our signatures in triplicate, this 18th day of December, 1895.

J. G. JAMES.
GEO. H. APPEL.

Witness:
E. A. FOTHERINGHAM.

We, the president and secretary of the Baboquivari Land and Cattle Company, under and by virtue of a resolution passed by the board of directors, hereby consent to the execution of the above contract and hereby ratify and confirm the same.

A. HEMME, *President.*
[SEAL.] GERTRUDE HEMME, *Secretary.*

(Endorsed:) No. 2579. Second amend. complaint. Filed this October 25th, 1897. C. D. Hoover, clerk, by A. C. Bernard dp. clerk.

* * * * * * *

30 (Title of Court and Cause.)

Amended Answer.

2. Comes the defendant and files this his amended answer herein, the same to be additional to the answer already on file in said case.

31 And for such additional answer, defendant denies each and every the allegations in said complaint contained.

3. And for a further answer defendant alleges, that he did not, at any time, take into his possession, drive or transport out of said Pima county, nor did he cause to be taken into possession, driven or transported out of the said county, any cattle included in, conveyed or covered by the chattel mortgage specified in said complaint.

4. And for a further answer defendant alleges, that the cattle, and all thereof, gathered and caused to be gathered by him in said county, and by him shipped out of said county, were cattle on which plaintiff had no lien, claim or right of any kind whatsoever.

5. And for a further answer defendant alleges, that the Baboquivari Land and Cattle Company is a corporation organized under the laws of the State of California; that the chattel mortgage specified in the said complaint alleges that said corporation was organized, among others, for the purpose of carrying on a cattle business in said Pima county; that said chattel mortgage was made on July 28th, 1894, and was filed with the recorder of Pima county on August 27th, 1894; that said corporation did not appoint any agent on whom service could be had, pursuant to the statute in such cases made and provided, and it did not have such agent, until long after said chattel mortgage had been filed as aforesaid; that by reason thereof said chattel mortgage is void, and did not and could not create any lien on the property of said corporation that was situated in said Pima county; and that the cattle described in said chattel mortgage are described as being in said county.

Wherefore, and by reason of the premises aforesaid, de-
32 fendant avers that the plaintiff, at no time, had a lien on the cattle of said corporation.

6. And for a further answer defendant alleges, that said chattel mortgage was given by the president of the said Baboquivari Land and Cattle Company to his wife, without any authority of the board of directors of said corporation so to do, and that the same is therefore unauthorized, was made without authority and is void.

7. And for a further answer defendant alleges, that the note described in the chattel mortgage specified in plaintiff's complaint, was assigned to plaintiff long after its maturity, and was assigned without any consideration whatsoever; that said note and said chattel mortgage were given by the president of the said Baboquivari Land and Cattle Company to his wife without consideration, and were given for the sole purpose of protecting and saving the cattle therein described from the creditors of said corporation, said corporation then being insolvent, and for no other purpose and with no other intent whatsoever; and that, by reason thereof, said note and mortgage are fraudulent and void.

8. And for a further answer defendant alleges, that the cattle in said complaint described as the Club and Slipper cattle, then being in said county of Pima, were, on or about October 16th, 1895, sold at public vendue by the then sheriff of the said county, by virtue of two certain executions to him directed, issued out of the clerk's office of the said district court of the aforesaid county; that said executions were issued as aforesaid by virtue of and by reason of two certain judgments theretofore rendered by said court in two certain cases then pending in said court, wherein J. Geo. Hilzinger was the plaintiff in one of them and Charles T. Etchells was the plaintiff in the other and the said Baboquivari Land and Cattle Com-
33 pany was the defendant in both of them, said judgments being against said corporation and were rendered on or about April 30, 1895.

That at said sale one Hugo Donau became the purchaser of said cattle, and of all thereof. That thereafter the defendant purchased

from the said Donau said cattle, and all thereof, and paid him therefor in money more than their full value; and that, at the time of defendant's said purchase, said cattle, nor were any thereof, mortgaged to any person whomsoever, that is to say: That at the time of the purchase of the said cattle by the defendant, as aforesaid, there was not filed in the office of the recorder of said county any mortgage covering, or upon said cattle, or any thereof.

Wherefore, and by reason of the premises aforesaid, defendant alleges that said plaintiff had no lien on any of the cattle so purchased by defendant as aforesaid, at any time, nor has he now, nor upon any thereof, and that defendant had the lawful right to gather said cattle and transport the same wheresoever he pleased.

9. And for a further answer defendant alleges, that one A. Hemme was the organizer of the said Baboquivari Land and Cattle Company and he alone owned said corporation and all of it; that said corporation was a failure, and, at the times hereinafter stated, was hopelessly insolvent; that its property and all thereof, consisted only of a herd of range neat cattle known as the Club and Slipper cattle, and some horses; that all of said property had been sold on execution sale to one Hugo Donau, on executions issued out of the clerk's office of said court by virtue of two certain judgments rendered by said court against said corporation; and thereafter, and before the times hereinafter stated, said Donau had sold the
34 same to the defendant; that defendant had paid said Donau in full therefor, and the possession thereof had been, by said Donau, turned over to defendant.

That defendant had bought and paid for such cattle, as aforesaid, on representations made to defendant as to the number and grade thereof; that after the purchase of the same defendant returned to San Francisco where the said Hemme with whom defendant had been acquainted for many years, in company with plaintiff, called upon the defendant and had an interview with him concerning said cattle, and others; and that, at said interview, it was represented to said defendant by said Hemme and acquiesced in by said plaintiff, that said cattle were worth a great deal more money than the amount that defendant had paid to Donau therefor; that there was then running with said two herds of cattle a certain other herd of cattle known as the L. Z. herd of cattle, and owned by L. Zeckendorf & Co.; that said Hemme or said corporation had a contract with said L. Zeckendorf & Co. for the purchase of said L. Z. herd of cattle, on which contract large payments had already been made, and that the value of the said L. Z. herd of cattle was greatly in excess of the amount still due said L. Zeckendorf & Co., on said contract of purchase; that the said corporation was insolvent and had no means or credit, and that the said Hemme was insolvent and had no means or credit; but that as said three herds of cattle, as represented by said Hemme and acquiesced in by said plaintiff as aforesaid, at said interview, were of a value greatly in excess of the amount defendant had paid for the said Club and Slipper cattle, and the amount still to be paid to L. Zeckendorf & Co., on the

contract of purchase of the said L. Z. cattle; and that the excess of value was the only property possessed by the
35 said Hemme, and all that said Hemme had with which to maintain himself and his family, therefore, they, the said Hemme and the said plaintiff importuned the said defendant to advance the money necessary to pay off the balance yet due to the said L. Zeckendorf & Co., on the contract of purchase of the said L. Z. cattle; and that, when this was done, the defendant would then gather the said L. Z. cattle, sell them, and with the money received therefor, to reimburse himself for the money he had so paid out in the purchase of said three herds of cattle, together with interest thereon and all expenses incurred, including such horses as were included in said sales; and that, if it should transpire, that enough of the said L. Z. cattle should not be found to repay to defendant said sum so paid and to be paid by him as aforesaid, then and in that event, defendant should sell enough of said Club and Slipper brand of cattle to make up the said amount, and the remaining cattle should be by said defendant turned over to the said plaintiff, to be held by him for and on account of said Hemme, as aforesaid, said plaintiff then and there claiming that he had a chattel mortgage on said Club and Slipper cattle which he held for the benefit of the said Hemme and his family.

That to these importunities defendant said, that he knew nothing as to the number nor as to the value of the said L. Z. cattle, but that if they were of a value sufficient to warrant him in paying the amount still due thereon to said L. Zeckendorf & Co. he would do so, otherwise he would not; that thereupon the said Hemme asserted that he knew all about said L. Z. cattle, the number and the value thereof; and that their said value was greatly in excess of the
36 amount still due thereon, as aforesaid, and the amount defendant had paid said Donau for said Club and Slipper cattle.

That defendant believing in and relying on said representations, agreed with plaintiff and said Hemme to pay the amount still due on the said L Z cattle, to then gather and market the same, and that so soon as his said advance was made by him on the said L Z cattle, the purchase price of the said Club and Slipper cattle, the expenses incurred thereon and interest thereon, he would then turn over to plaintiff the cattle still remaining on hand of said brands. That thereafter, and on or about the 18th day of December, 1895, the said plaintiff and Hemme returned to defendant with a written agreement, which they wished defendant to sign, they claiming that it correctly expressed the agreement defendant had agreed to make as aforesaid. That defendant thereupon examined said agreement and refused to sign it, and for the reason that it bound defendant, as it was then drawn, to pay the amount then due said L. Zeckendorf & Co., on said L Z cattle regardless of the amount so due and of the value of said cattle, the defendant not then having any knowledge, save the said representations of said Hemme, as to the value thereof.

That thereupon defendant amended said written agreement by

inserting therein that a sufficient number of said L Z cattle and the horses belonging to said brand should be appraised and repay to him his said advance and all thereof before he should be called upon to make the same; and the said agreement being so amended, defendant was content to execute the same and thereupon did execute the same; said contract thus executed being the one specified in plaintiff's complaint.

37-45 And defendant further alleges that thereafter he made diligent inquiry into the number and value of the said L Z herd of cattle, and into the amount due the said L. Zeckendorf & Co., thereon as aforesaid; that by means of this inquiry he learned, and now charges the fact to be, that the amount then due the said L. Zeckendorf & Co., on said contract of purchase of said L Z cattle was greatly in excess of the value of said herd, and that by reason thereof, defendant refused to advance said amount due on said L Z cattle; that, upon making the discovery that said amount still due on said L Z cattle was greatly in excess of the value of said cattle, he at once notified plaintiff thereof, and that he would not make said advance, to which plaintiff consented, then agreeing with defendant that it would be manifestly unwise so to do.

That thereafter defendant gathered all of the cattle in said Club and Slipper brand, and their increase, and all the horses in said brand, that he *he* was able to find and sold the same at their then full market value; and that the amount he received therefor was much less than the amount he had paid the said Donau therefor as aforesaid, including his necessary expenses in the gathering and sale thereof.

Wherefore, and by reason of the premises aforesaid, defendant prays to be hence dismissed with his costs in this behalf most wrongly expended.

BARNES & MARTIN AND
C. W. WRIGHT,
Attorneys for Defendant.

(Endorsed:) "2579. Defendant's amended answer. Filed May 3, 1899. Clinton D. Hoover, clerk."

* * * * * * *

46 (Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

This cause having been called regularly for trial before the court (a trial by jury having been expressly waived by the respective parties hereto), and Messrs. Hereford & Hazzard appearing as attorneys for the plaintiff, and Messrs. Barnes & Martin and C. W. Wright, Esq., appearing as attorneys for the defendant, and the court having heard the proof of the respective parties and considered the same and the records and papers in the case, and the cause having been submitted on briefs to the court for its decision, the court now finds the following facts:

*

I.

That the plaintiff is a resident of the county of Pima, Territory of Arizona, and that the defendant is a resident of the city and county of San Francisco, State of California.

II.

That on December 18, 1895, the plaintiff and defendant made a written agreement, wherein it was recited that the said plain-
47 tiff was the owner and in possession of a certain note for fifty thousand dollars, and of a certain chattel mortgage executed to secure the same on the 28th day of July, 1894, by the Baboquivari Land and Cattle Company, a corporation, upon all that brand of cattle known as the Club brand, running on the range of the Baboquivari Land and Cattle Company in Pima county, Arizona; that the plaintiff had brought an action to foreclose said chattel mortgage, he being then the assignee thereof; which said action was then pending; and that in said action he had made the Baboquivari Land and Cattle Company, a corporation, Hugo J. Donau, trustee, J. George Hilzinger, and Charles T Etchells, defendants; that certain judgments rendered against the Baboquivari Land and Cattle Company had been purchased by the defendant herein, and he had thereby become the owner of all such rights as pertained to said judgments and the levy of attachment thereunder, in and to the cattle described in said mortgage.

III.

That said defendant agreed, as a condition precedent to his taking any rights under said contract, to own and possess all of the said cattle branded as aforesaid with the Club brand; and the said defendant also agreed in the said contract, as a condition precedent to his taking any rights under said contract, to purchase from the firm of L. Zeckendorf & Company, who were then the owners thereof, a certain cattle ranging in said Pima county on the said Baboquivari Land and Cattle Company's range, and branded Z, and to pay L. Zeckendorf & Co. for the same, and to obtain from L. Zeckendorf & Company all their right, title and interest in and to said cattle and horses bearing the said Z brand.

48 IV.

That the plaintiff relying upon the performance by the defendant of the conditions precedent as aforesaid, permitted the defendant to enter into possession of all of the said cattle bearing the said Club brand, for the purpose of enabling the defendant to segregate therefrom and remove a certain quantity of the Z cattle running with the said Club brand of cattle.

V.

That the defendant failed, neglected and refused to perform the said conditions precedent, and taking advantage of the possession of the said cattle branded with the said Club brand, removed from the said county of Pima twelve hundred and ten (1210) head of cattle branded with the Club brand. That the removal of the said Club brand of cattle by the said defendant from the county of Pima, and Territory of Arizona, was wrongful and unlawful and a tortious conversion of the property.

VI.

That the twelve hundred and ten (1210) head of cattle branded with the said Club brand were so converted and removed out of the county of Pima and Territory of Arizona in the year 1895; and that the said cattle were on said date worth the sum of seven dollars ($7.00) per head, or a total of eight thousand four hundred and seventy dollars ($8,470). That by wrongfully removing the said cattle from the county of Pima and Territory of Arizona, the defendant wrongfully took the same, and in violation of his contract and agreement with the plaintiff, and deprived the plaintiff of the right of subjecting them to the payment of his said chattel mortgage, and plaintiff was thereby damaged in the sum of eight thousand
49 four hundred and seventy dollars ($8,470).

Conclusions of Law.

As conclusions of law from the foregoing facts, the court now hereby finds, decides and holds, that the plaintiff has been damaged and injured by the defendant in the sum of eight thousand four hundred and seventy dollars ($8,470); that said damage has been occasioned by the wrongful and tortious act of the defendant, and that judgment should be rendered against the defendant, in favor of the said plaintiff, for the said sum of eight thousand four hundred and seventy dollars ($8,470), with interest thereon from the date hereof until paid at the rate of seven per cent. (7 %) per annum; and judgment is hereby ordered to be entered accordingly.

Dated —.

WEBSTER STREET, *Judge.*

(Endorsed:) "2579. Findings of fact and conclusions of law. Filed Dec. 22, 1899. Clinton D. Hoover, clerk."

(Title of Court and Cause.)

Decree.

This cause came on regularly for trial on the 4th day of May, A. D. 1899, Messrs. Hereford & Hazzard appearing as counsel for the plaintiff, and Messrs. Barnes & Martin and C. W. Wright appearing as counsel for the defendant. A trial by jury having been expressly

waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury, whereupon Frank H.
50 Hereford, George P. Scholefield, S. M. Franklin, C. F. Schumacher, James G. James and Alfred Steinfeld were examined as witnesses on behalf of the plaintiff, and the defendant and C. F. Schumacher were examined as witnesses on behalf of the defendant, and certain documentary evidence was introduced by the plaintiff and by the defendant, and the evidence being closed the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court delivered its findings and decision in writing, which was filed, and ordered that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that George H. Appel, the plaintiff, do have and recover of and from James G. James, the defendant, the sum of eight thousand four hundred and seventy dollars ($8,470), with interest thereon at the rate of 7 % per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $229.90, and that the said sum of $8699.90, and interest be paid by the said defendant in gold coin of the United States. Judgment rendered this — day of —— 1899.

WEBSTER STREET, *Judge.*

(Endorsed:) "2579. Decree. Filed Dec. 22, 1899. Clinton D. Hoover. clerk."

(Title of Court and Cause.)

Motion for New Trial.

Now comes the defendant by Barnes & Martin and C. W. Wright his attorneys, and moves the court to set aside the judgment entered herein, and grant a new trial, on the following grounds,
51–66 to wit:

1st. The court erred in rejecting evidence offered by defendant.

2nd. The court erred in admitting improper, incompetent and irrelevant evidence over the objection of the defendant.

3rd. The court erred in not rendering judgment for defendant.

4th. The court erred in holding that said contract is based upon any condition precedent.

5th. The court erred in holding that the alleged condition precedent in said contract claimed was not thereafter waived by the parties thereto.

6th. The court erred in not finding the issues for the defendant.

7th. The evidence does not sustain the judgment.

8th. The judgment is contrary to the law and the evidence.

BARNES & MARTIN AND
C. W. WRIGHT,
Attorneys for Defendant.

(Endorsed:) "2579. Motion for new trial. Filed Jan. 11, 1900. Clinton D. Hoover, clerk."

(Title of Court and Cause.)

Order Continuing Cause.

It is hereby ordered that the hearing on the motion for a new trial in the above entitled cause be continued until the next term of this court.

At chambers, Phœnix, March 30, 1900.

WEBSTER STREET, *Judge.*

(Endorsed:) "2579. Order continuing cause for the term. Filed March 31, 1900. Clinton D. Hoover, clerk, by L. G. Davis, deputy."

* * * * * * *

67 (*Minute Entry of March* 31, 1900.)

GEORGE H. APPEL, Plaintiff,
vs.
J. G. JAMES, Defendant. } 2579.

It is by the court ordered that the hearing of the defendant's motion to set aside the judgment herein and for a new trial be, and the *said* is hereby continued until the next term of this court. (Q. 350-351.)

(*Minute Entry of July* 21, 1900.)

G. H. APPEL, Plaintiff,
vs.
J. G. JAMES, Defendant. } 2579.

This cause having been tried before the Hon. Webster Street, chief justice, and having been decided by him; and it appearing to the court that he has been unable to attend the present term o
68 this court to hear and determine the motion for a new trial herein, but will be able to do so at the next term of this court, therefore it is by the court ordered, that said motion for a new trial be continued for hearing until the next term of this court. (Q. 609.)

(*Minute Entry of March* 30, 1901.)

G. H. APPEL, Plaintiff,
vs.
J. G. JAMES, Defendant. } 2579.

This cause having been tried before the Hon. Webster Street, chief justice, and having been decided by him; and it appearing to the

court that he has been unable to attend the present term of this court to hear and determine the motion for a new trial herein, but will be able to do so at the next term of this court, therefore it is by the court ordered, that said motion for a new trial be continued for hearing until the next term of this court. (R. 84.)

(*Minute Entry of May 29, 1901.*)

G. H. APPEL, Plaintiff,
vs.
J. G. JAMES, Defendant. } 2579.

This matter came on this day regularly to be heard upon the motion of the plaintiff to vacate the order heretofore entered in this cause on March 31, 1900, continuing the motion for a new trial in this cause over for the term, Messrs. Hereford & Hazzard appearing as attorneys for the plaintiff, and Messrs. Barnes & Martin appearing as attorneys for the defendant. Whereupon the matter was fully submitted to the court, and the court being fully advised in the premises, does overrule and deny said motion. And thereupon the matter came on to be heard upon the motion of the plaintiff to vacate
the order heretofore entered in this cause on July 21, 1900,
69–202 continuing the motion for a new trial in this cause over for
the term. Whereupon the matter was fully submitted to the court, and the court being fully advised in the premises does overrule and deny said motion. The matter then came on to be heard upon the motion of the plaintiff to vacate the order heretofore entered in this cause on March 30, 1901, continuing the motion for a new trial in this cause over for the term. Whereupon the matter was fully submitted to the court and the court being fully advised in the premises, does overrule and deny said motion. And thereupon the matter came on to be heard upon the motion of the defendant to set aside the judgment and to grant a new trial herein. And the matter being fully submitted to the court, and the court being fully advised in the premises, does overrule and deny said motion, to which ruling of the court in overruling and denying said motion, the defendant, through his counsel aforesaid, excepts, and gives notice of his appeal to the supreme court of the Territory. (R. 297–298.)

* * * * * * *

203 In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant and Defendant,
vs.
GEORGE H. APPEL, Appellee and Plaintiff. } Motion.

The appellee moves this honorable court to dismiss the appeal of appellant, and for cause shows:

I.

That the final judgment from which the appeal was prosecuted was rendered and entered on the 11th day of January, 1000:

II.

That thereafter and on the said 11th day of January, 1900, appellant filed a motion for a new trial.

III.

That appellant took no further action in said cause until the 29th day of May 1901, when he presented his motion for a new trial.

IV.

That on the 31st day of March, 1900, the term of court at which the said judgment was rendered was ended and terminated by operation of law.

V.

That on the said 31st day of March, 1900, it was "by the
204 court ordered that the hearing of the defendant's motion to set aside the judgment herein and for a new trial be, and the *said* is hereby continued until the next term of this court," no reason being given therefor.

VI.

That thereafter and on July 21, 1900, the said 21st day of July being the last day of the term of court then being held, another order continuing the hearing of the motion for a new trial over until the next term of court was made; the reason for such continuance being "that the Honorable Webster Street, chief justice, having sat at the trial of the cause, and having since been unable to attend the court to hear and determine a motion for a new trial, would be able to do so at the next term of court."

VII.

That thereafter, and on March 30th, 1901, the said March 30th being the last day of the term of court then being held, another order was made continuing the hearing of the motion for a new trial until the next term of court. The reasons given for such continuance being the same as in the last above mentioned order.

VIII.

That thereafter and on April 17th, 1901, appellee filed his motions to vacate the orders heretofore entered in this cause on March
205 31, 1900, on July 21, 1900, and on March 30, 1901, on the ground "that the court had no power to make said orders by reason of the fact that the statutes of the Territory of Arizona

require that a motion for a new trial shall be determined by the court at the term at which the motion shall be made, and by reason of the further fact that there being no ruling upon said motion for a new trial during the term at which it was filed, it was by the adjournment of the term of said court denied;" and upon the further ground "that the court exceeded its jurisdiction in making the said order." Said motions came on regularly to be heard on May 29th, 1901, and each thereof upon being argued and submitted to the court was by the court denied.

IX.

That thereupon, and on the said 29th day of May, 1901, the motion for a new trial was submitted to the court; the appellee neither argued nor took any action in recognition of appellant's right to have the motion for a new trial heard; and the court thereupon over-ruled and denied said motion for a new trial.

X.

And thereupon, and on the said 29th day of May, 1901, appellant gave notice of appeal to the supreme court of the Territory of Arizona.

Wherefore, it appears from the record in this action that the appeal from the said judgment rendered as aforesaid on the 11th day of January, 1900, was not attempted to be taken until May 29th, 1901, more than one year after the said judgment had been
206 rendered, and at the end of the third term of court after the said judgment had been rendered: All of which appears more fully from the record herein.

Wherefore, appellee moves as aforesaid, that the appeal of appellant be dismissed.

Respectfully submitted.

HEREFORE & HAZZARD,
Attorneys for Appellee.

(Endorsed:) No. 766. In the supreme court, of the Territory of Arizona. Jas. G. James, appellant and def't, *vs.* Geo. H. Appel appellee and plaintiff. Motion. Filed this first day of November, 1901, Thomas Grindell, clerk. Service admitted this 31st day of October, 1901, Barnes & Martin & S. M. Franklin, attorneys for appellant.

207 In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant,
vs.
GEORGE H. APPEL, Appellee. } No. 766.

Be it remembered that on Saturday November 2nd, 1901, that being a regular juridical day of the November term, 1901 of said court, the following record of this case was made for this day, to-wit

Title of Cause.

It is ordered that the motion to dismiss appeal, filed herein by appellee, be submitted.

On Wednesday, January 29th, 1902, that being a regular juridical day of the January term, 1902, of said court, the following record in this case for this day was made, to-wit:

Title of Cause.

The motion to dismiss appeal, filed herein by appellee, having been heretofore submitted and by the court taken under consideration and the court having considered the same and being fully advised in the premises: It is ordered that said motion be sustained and the appeal be and the same is hereby dismissed.

It is further ordered, adjudged and decreed that the ap-
208 pellee herein, do have and recover of and from James G. James the appellant herein, and Albert Steinfeld and Geo. P. Myers, sureties on appeal bond herein, his costs in this court taxed at thirty-two and 25/100 ($32.25) dollars, and his costs in the district court in this cause incurred and have execution therefor.

In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant,
vs.
GEORGE H. APPEL, Appellee. } No. 766.

Frank H. Hereford being duly sworn on oath says that he is one of the attorneys for appellee in the above entitled cause, and that appellee's costs in said cause are as follows, viz.:

For 2 briefs filed in said cause, 20 pages @ $1.00.....	$20.00
For supreme court clerk's fees, to date, in said cause..	12.25
	$32.25

FRANK H. HEREFORD.

Subscribed and sworn to before me this 21st day of Feb. 1902.

[SEAL.]

EMMA A. MILLER,
Notary Public.

My com. expires Oct. 12, 1902.

(Endorsed:) No. 766. Supreme court Arizona. James G. James *vs.* George H. Appel. Cost bill. Filed Feb'y 24, 1902. James Allen Cox, clerk.

209 In the Supreme Court of the Territory of Arizona.

GEORGE H. APPEL, Plaintiff and Respondent,
vs.
JAMES G. JAMES, Defendant and Appellant.

Assignment of Errors.

Comes now the defendant and appellant and files the following assignment of errors upon which he will rely on his appeal from the decree made by this honorable court on the 29th day of January, 1902, dismissing his appeal from the order of the district court of the Territory of Arizona, denying his motion for a new trial:

I.

That the supreme court of the Territory of Arizona erred in dismissing defendant's and appellant's appeal from the order denying a new trial in the district court of Arizona, on the ground that said appeal was not taken within twenty days from the time of the rendition of the said order denying a new trial. Said judgment being based upon the ground that the statute of Arizona itself operated to deny defendant and appellant a new trial at the termination of the term at which the motion for a new trial was made, if not acted upon by the court within that time, and that thereby the
210 orders of the district court postponing the hearing of the motion for a new trial and the failure of the court to pass upon that motion for a new trial until the 29th day of May, 1901, and the denial of appellant's motion by the court upon that date, had no effect upon the time for appeal, but that said statute, by failure of the court to pass upon the motion at the term on which it was made, did, upon the expiration of that term, and by operation of law, operate to deny defendant and appellant a new trial and that his time for appeal ran from that date.

II.

That the statute of Arizona purporting to deny a new trial by operation of law upon the failure of the judge to pass upon the questions therein presented at the term at which the motion was made is unconstitutional and void on the ground that the same is in conflict with the organic act of the Territory of Arizona in this: that the organic act of the Territory of Arizona provides a jurisdiction of the courts shall be as limited by law, with which provision this statute is in conflict.

III.

That the statute of Arizona purporting to deny a new trial by operation of law upon the failure of the judge to pass upon the ques-

tions therein presented at the term at which the motion was made is unconstitutional and void in that it is an invasion of the judicial by the legislative power.

THOMAS B. BISHOP,
Attorney for Defendant and Appellant.

211 (Endorsed:) No. 766. In the supreme court of the Territory of Arizona. George H. Appel, plaintiff and respondent, *vs.* James G. James, defendant and appellant. Assignment of errors. Filed June 24th, 1902. James Allen Cox, clerk. By Angie B. Parker, deputy.

In the Supreme Court of the Territory of Arizona.

GEORGE H. APPEL, Plaintiff and Respondent,
vs.
JAMES G. JAMES, Defendant and Appellant.

Petition for Appeal.

The above named defendant and appellant, James G. James, conceiving himself aggrieved by the order of this court, entered on the 29th day of January, 1902, dismissing his appeal from an order of the district court of the State of Arizona denying his motion for a new trial in the above entitled case, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that this, his appeal, may be allowed and that a transcript of the record and proceedings and papers upon which said order was made, together with a statement of facts as provided for by the act of April 7th, 1874, c. 80 sec. 2, 18 Statutes, 27, 28, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 23 day of June, 1902.

THOMAS B. BISHOP,
Attorney for Defendant and Appellant.

212 In the Supreme Court of the Territory of Arizona.

GEORGE H. APPEL, Plaintiff and Respondent,
vs.
JAMES G. JAMES, Defendant and Appellant.

Order.

And now, to-wit, on the 23rd day of June, 1902, it is ordered that the appeal may be allowed as prayed for.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 766. In the supreme court of the Territory of Arizona. George H. Appel, plaintiff and respondent, *vs.* James G. James, defendant and appellant. Petition for appeal and order allowing appeal. Filed June 24th, 1902, James Allen Cox, clerk. By Angie B. Parker, deputy.

213 In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant and Defendant, *vs.* GEORGE H. APPEL, Appellee and Plaintiff. } Certified Statement of Facts.

I, Edward Kent, chief justice of the supreme court of the Territory of Arizona, for and on behalf of said court, hereby certify the following statement to be the true and correct statement of the facts upon which the motion to dismiss the appeal of James G. James, made and entered on the 11th day of January, 1900, was determined by this court on the 29th day of January, 1902.

I.

That the final judgment of the district court in the sum of eight thousand four hundred and seventy ($8470.00) dollars, with interest thereon from date until paid at the rate of seven per cent. per annum, was entered on the 11th day of January, 1900, against James G. James, and in favor of George H. Appel.

II.

That thereafter on the 11th day of January, 1900, James G. James filed a motion for a new trial, which motion was filed within the time required by law.

214 III.

That on the 31st day of March, 1900, the term at which said judgment was rendered and entered, and in which said motion for a new trial was made was ended and terminated by operation of law.

IV.

That on the 30th day of March, 1900, it was by the Honorable Webster Street, chief justice of the supreme court of the Territory, and judge presiding over the district court, by which said judgment was rendered by chamber order entered of minutes, ordered that said motion for a new trial and to set aside the judgment, "be and the same is hereby continued until the next term of this court," and that said order was made before said term expired.

V.

That the next succeeding term to that which terminated on the 31st day of March, 1900, terminated on the 21st day of July, 1900.

VI.

That on said 21st day of July, 1900, the same being the last day of said term, an order was made by the judge of the district court, George R. Davis presiding, having jurisdiction of said motion for a new trial, and motion to set aside judgment continuing the hearing of said motion over until the next term of court. Said judge assigning the reason for such continuance as follows:

215 "That the Honorable Webster Street, chief justice, having sat in the trial of the cause and having since then been unable to attend the court to hear and determine the said motion for a new trial, and it further appearing that he will be able to do so during the next term, said motion for a new trial is hereby continued until said next term."

VII.

That thereafter and on the 30th day of March, 1901, said 30th day of March being the last day of the term next succeeding that terminating on the 21st day of July, 1900, an order was made by the judge of the district court, George R. Davis presiding, having jurisdiction of said motion for a new trial, and motion to set aside judgment continuing the hearing of said motion over until the next term of court. Said judge assigning the reason for such continuance as follows:

"That the Honorable Webster Street, chief justice, having sat in the trial of the cause and having since then been unable to attend the court to hear and determine the said motion for a new trial, and it further appearing that he will be able to do so during the next term, said motion for a new trial is hereby continued until said next term."

VIII.

That thereafter on the 29th day of May, 1901, said 29th day of May being a day in the term next succeeding that terminating on the 30th day of March, 1901, the Honorable Webster

216 Street heard and denied James G. James' motion to vacate and set aside the judgment and for a new trial.

IX.

That thereafter and upon said 29th day of May, 1901, said James G. James gave notice of appeal to the supreme court of the Territory of Arizona from the said order of the Honorable Webster Street denying his motion to set aside judgment and grant a new trial.

X.

That this court upon the motion made and filed by George H. Appel, in the above entitled action, dismissed the appeal of James G. James, appellant herein, on the ground that same was not made and taken within the time required by law.

I hereby approve the above statement as a correct statement of the facts in the above entitled cause as to the orders for the continuance of the hearing of the motion for a new trial, and as to the terms in which said orders were made.

WEBSTER STREET,
Ex Chief Justice of the Territory of Arizona and Judge Presiding Over the District Court at the Trial and Hearing of said Motion for a New Trial.

I hereby certify that the above entitled statement is a true statement of the facts and decision in the above entitled action.

EDWARD KENT,
[SEAL.] *Chief Justice of the Territory of Arizona.*

217 (Endorsed:) No. 766. In the supreme court of the Territory of Arizona. James G. James *vs.* Geo. H. Appel. Certified statement of facts. Filed June 25, 1902. James Allen Cox, clerk. By Angie B. Parker, deputy.

In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant and Defendant,
vs.
GEO. H. APPEL, Plaintiff and Appellee.

Know all men by these presents: That James G. James, as principal, and Albert Steinfeld and Edward W. Bowers, as sureties, are held and firmly bound nnto Geo. H. Appel in the full and just sum of five hundred ($500.00) dollars, to be paid to the said Geo. H. Appel, his attorneys, executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with out seals and dated this 23rd day of June, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a session of the supreme court of the Territory of Arizona, in the suit pending in said court, wherein James G. James, is defendant and appellant and Geo. H. Appel is plaintiff and appellee, a decree was rendered against said James G.
218 James on the 29th day of January, 1902, and said James G. James having obtained from said court an order allowing an appeal to the United States Supreme Court to reverse said decree

made in said suit on said 29th day of January, 1902, and a citation directed to the said Geo. H. Appel is about to be issued citing and admonishing him to appear at the United States Supreme Court to be holden in the city of Washington, District of Columbia;

Now, the condition of the above obligation is such that if the said James G. James shall prosecute his said appeal, and shall answer all damages and costs that may be awarded against him, or if he shall make good his plea, that the above obligation is to be void, otherwise to remain in full force, virtue and effect.

J. G. JAMES,
Appellant and Defendant.

ALBERT STEINFELD,
EDWARD W. BOWERS,
Sureties.

TERRITORY OF ARIZONA, *Pima County,* } *ss:*

Before me Harry Y. Harrison, a notary public in and for Pima county, Arizona Territory, on this day personally appeared Albert Steinfeld and E. W. Bowers the sureties whose names are subscribed to the foregoing bond as sureties, who each for himself deposes and says that he is a resident and freeholder or householder within the Territory of Arizona; that he is at least worth the amount for which he has become surety on said bond, over and above his just debts and liabilities and exclusive of property exempt from execution and forced sale.

219

ALBERT STEINFELD.
E. W. BOWERS.

Subscribed and sworn to before me this 23d day of June 1902.

[SEAL.]

HARRY Y. HARRISON,
Notary Public, Pima Co., Ariz.

My commission as notary public expires June 6th, 1904.

(Endorsed:) I hereby approve the within bond and the sureties therein named. Phœnix, June 25, 1902. Edward Kent, chief justice of the supreme court of Arizona. No. 766. In the supreme court of the Territory of Arizona. James G. James, appellant and defendant, *vs.* Geo. H. Appel, plaintiff and appellee. Bond of appellant on appeal to the United States Supreme Court. Filed June 25, 1902, James Allen Cox, clerk. By Angie B. Parker, deputy.

220 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

I, James Allen Cox, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing typewritten pages (numbered from 1 to 17 inclusive) to be full, true and correct copies of the motion to dismiss, cost bill; assignment of errors; petition for and allowance of appeal; certified statement of facts; bond on appeal, and all orders and proceedings of said court had and entered of record, in a certain case lately pending in said court wherein James G. James was appellant and George H. Appel was appellee, as the same remain of record and on file in my office.

Also that the citation attached hereunto is the original citation issued by said supreme court of the Territory of Arizona.

I further certify that the printed copy of the abstract of record attached hereunto is one of the copies of abstract of record filed in said cause, as the same remain of record and on file in my office.

Seal Supreme Court of Arizona.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 18th day of July A. D., 1902, at Phœnix, Arizona.

JAMES ALLEN COX,
Clerk Supreme Court of Arizona,
By ANGIE B. PARKER,
Deputy Clerk.

221 In the Supreme Court of the Territory of Arizona.

GEORGE H. APPEL, Plaintiff and Respondent,
vs.
JAMES G. JAMES, Defendant and Appellant.

UNITED STATES OF AMERICA, ss:

To George H. Appel, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held in the city of Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to and — allowing an appeal filed in the office of the clerk of the supreme court of the Territory of Arizona, in a case therein pending, in which James G. James is appellant and defendant and you plaintiff and appellee, to show cause, if any there be, why the judgment rendered against the defendant and appellant, mentioned in the petition and order allowing the appeal on file in the clerk's office of the supreme court of the Territory of Arizona,

should not be corrected and why speedy justice should not be done to the parties in that behalf.

222 Witness the Honorable Edward Kent chief justice of the supreme court of the Territory of Arizona this 25th day of June, 1902, and of the Independence of the United States 126.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

223 OFFICE OF SHERIFF, } ss:
County of Pima, }

I hereby certify that I received the within citation on the 27th day of June A. D. 1902, at the hour of 8.30 a. m., and personally served the same on the 27th day of June 1902, at the hour of 8.45 a. m. on George H. Appel being the appellee named in said citation, by delivering to Mr. Hazzard a member of the firm of Hereford and Hazzard, attorneys for George H. Appel in the within named action, in the county of Pima, Territory of Arizona, a true copy of said citation.

Dated this the 27 day of June A. D. 1902.

FRANK E. MURPHY, *Sheriff,*
By E. DRACHMAN, *Deputy.*

Fees.

Service	$1.50	Pima Co.
Copies		
Mileage 1	30	
Total	$1.80	
Notary fee	75	
Extra expense	2.00	
Total	4.55	

224

GEORGE H. APPEL }
vs.
JAMES G. JAMES. }

TERRITORY OF ARIZONA, }
County of Pima. }

E. Drachman being first duly sworn deposes and says that he is deputy sheriff of the county of Pima, Territory of Arizona. That he has made due and diligent search for George H. Appel appellee named in the citation to which this affidavit is attached and that he has been unable to find said George H. Appel within the Territory of Arizona. That on the 27th day of June 1902 he served a true

copy of the citation to which this affidavit is annexed upon Seth E. Hazzard a member of the firm of Hereford and Hazzard, attorneys for George H. Appel, in the above entitled action, by delivering personally to said Seth E. Hazzard at 8.45 o'clock on the 27th day of June 1902 in the county of Pima, Territory of Arizona, a true copy of the citation to which this affidavit is annexed.

E. DRACHMAN,
Deputy Sheriff.

Subscribed and sworn to before me this 27th day of June, A. D., 1902.

[Seal of William F. Cooper, Notary Public, Pima Co., Arizona Terr.]

WILLIAM F. COOPER,
Notary Public, Pima County, Arizona Territory.

My commission expires March 13, 1905.

225 [Endorsed:] No. 766. In the supreme court of the Ter-itory of Arizona. George H. Appel, plaintiff and respondent, *vs.* James G. James, defendant and appellant. Citation. Filed July 16th 1902 James Allen Cox clerk. By Angie B. Parker deputy. Thomas B. Bishop, attorney for appellant, 532 Market St., San Francisco, Cal.

226 In the Supreme Court of the United States.

JAMES G. JAMES, Appellant,
vs.
GEORGE H. APPEL, Appellee.

Statement of Errors upon Which Appellant Intends to Rely, and Portions of the Record Necessary in His Opinion for the Consideration Thereof.

Comes now the defendant and appellant, and files the following assignment of errors upon which he will rely upon this his appeal from the decree made by the honorable supreme court of the Territory of Arizona on the 29th day of January, 1902, dismissing his appeal from the order of the district court of the Territory of Arizona denying his motion for a new trial, together with a statement of such portions of the record, filed in this court, as he thinks necessary for the consideration thereof.

Statement of Errors.

I.

That the supreme court of the Territory of Arizona erred in dismissing defendant's and appellant's appeal from the order denying a new trial in the district court of Arizona, on the ground that said appeal was not taken within twenty days from the time of the ren-

dition of the said order denying a new trial. Said judgment being based upon the ground that the statute of Arizona itself
227 operated to deny defendant and appellant a new trial at the termination of the term at which the motion for a new trial was made, if not acted upon by the court within that time, and that thereby the orders of the district court postponing the hearing of the motion for a new trial and the failure of the court to pass upon that motion for a new trial until the 29th day of May, 1901, and the denial of appellee's motion by the court upon that date had no effect upon the time for appeal, but that said statute, by failure of the court to pass upon the motion at the term on which it was made, did, upon the expiration of that term, and by operation of law, operate to deny defendant and appellant a new trial and that his time for appeal ran from that date.

II.

That the statute of Arizona purporting to deny a new trial by operation of law upon the failure of the judge to pass upon the questions therein presented at the term at which the motion was made is unconstitutional and void on the ground that the same is in conflict with the organic act of the Territory of Arizona in this: That the organic act of the Territory of Arizona provides that the jurisdiction of the courts shall be as limited by law, with which provision this statute is in conflict.

III.

That the statute of Arizona purporting to deny a new trial by operation of law upon the failure of the judge to pass upon the questions therein presented at the term at which the motion was made is unconstitutional and void in that it is an invasion of the judicial by the legislative power.

228 *Statement of Portions of Record Believed by Appellant Necessary for the Consideration of the Above Assigned Errors.*

Second amended complaint, folios 1–64;
Amended answer, folios 120–149;
Findings of fact and conclusions of law, folios 182–200;
Decree, folios 196–200;
Motion for a new trial, folios 200–204;
Order continuing cause, folios 204–205;
Minute order of Mar. 31, 1900, folios 267–268;
Minute order of July 21, 1900, folios 268–269;
Minute order of Mar. 30, 1901, folios 270–271;
Minute order of May 29, 1901, folios 271–276;
Together with motion to dismiss appeal, minute entries judgment, assignment of error, petition for allowance of appeal, certified statement of facts, bond on appeal, and citation.

THOS. B. BISHOP,
Attorney for Defendant and Appellant.

229 OFFICE OF THE SHERIFF, } ss:
Pima County, }

I, hereby certify that I received the within statement of errors and portions of the records, on the 3rd day of September, 1902, and personally served the same on the 5th, day of September, 1902 on Mr. Hazzard a member of the firm of Hereford and Hazzard by delivering and leaving a copy of said statement of errors and portions of the records, with the said Hazzard in the city of Tucson county of Pima, Territory of Arizona.

Dated this 6th day of September, 1902

FRANK E. MURPHY, *Sheriff,*
By E. DRACHMAN, *Deputy.*

Subscribed and sworn to before me this 6th day of September, A. D. 1902.

[Seal District Court, First District, Pima Co., Arizona.]

CLINTON D. HOOVER,
Clerk District Court, First Judicial District,
Territory of Arizona, in and for Pima County.

[Endorsed:] In the Supreme Court of the United States. James G. James, appellant, *vs.* George H. Appel, appellee. Statement of errors and portions of the record The original hereof filed with me Aug. 29, 1902. James H. McKenney, clerk Sup. Ct. U. S. Proof of service, of designation by app't under sec. 9 rule 10.

[Endorsed:] File No. 18,638. Supreme Court U. S. October term, 1903. Term No. 108. James G. James appellant *vs.* Geo. H. Appel Proof of service of designation by appellant under section 9" rule 10. Filed June 23, 1903.

Endorsed on cover: File No. 18,638. Arizona Territory supreme court. Term No. 108. James G. James, appellant, *vs.* George H. Appel. Filed August 5th, 1902.

10460

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

JAMES G. JAMES,
Defendant and Appellant,
vs.
GEORGE H. APPEL,
Plaintiff and Appellee.

No. 108.

STATEMENT OF FACTS.

This action was commenced in the District Court of the First Judicial District, Territory of Arizona, in and for the County of Pima, issues of law and fact were raised by the pleadings, and after a jury trial, at which the jury were unable to reach a verdict, the cause was again tried and submitted to the Court sitting without a jury, a jury having been expressly waived.

The Court rendered and entered its judgment against the appellant on the 11th day of January, 1900, in the sum of $8,370.06 and interest. Thereafter, and

on the 11th day of January, 1900, appellant moved for a new trial. This motion was called for hearing on the 30th day of March, 1900, which was the day before the last day of the term at which the motion was made and the judgment rendered, and was on that day continued for hearing by the order of the Court until the next term of Court. At each succeeding term the motion was called for hearing, and at each time it was so called it was, on each occasion, continued until the next term (Tr., fols. 204, 205), the judge assigning as a reason for the continuance:

"That the Honorable Webster Street, Chief Justice, having sat in the trial of the cause and having since then been unable to attend the Court to hear and determine the said motion for a new trial, and it further appearing that he will be able to do so during the next term, said motion for a new trial is hereby continued until said next term."

(Tr., fols. 214, 215, 216.)

On the 29th day of May, 1901, a day to which the motion had been continued by the above orders, the Court (Hon. Webster Street, Chief Justice, sitting) heard and denied appellant's motion for a new trial and immediately upon the denial of the same appellant excepted to said order denying his motion and appealed to the Supreme Court.

(Tr., fol. 202.)

On the first day of November, 1901, appellee moved the Supreme Court of Arizona to dismiss the appeal of

James G. James on the ground that the appeal was not taken until the end of the third term after the judgment was rendered.

(Tr., fol. 206.)

This motion to dismiss the appeal was granted and from this judgment of dismissal this appeal is prosecuted.

The theory upon which the motion to dismiss the appeal was based, argued and decided,[1] was, that by a peculiar statute of the Territory of Arizona then in force, the motion for new trial was denied by operation of law at the termination of the term at which it was made, and that the time for appeal started to run from that date in spite of the orders continuing the cause until the succeeding term, and that at the time the motion for new trial was actually denied by the lower court, that Court was ruling upon a motion which had been denied by operation of law three terms prior to the date of the actual ruling of the Court.

The act of the Territorial Legislature claimed to have this effect, according to the briefs filed below, was paragraph 837, Revised Statutes of Arizona (1887), which provides:

"All motions for new trial in arrest of judgment or to set aside a judgment shall be determined at the term of the Court at which the motion shall be made."

There was, however, another paragraph of the Revised Statutes of Arizona, called to the attention of the

[1] No opinion was ever filed or delivered by the Supreme Court of Arizona.

Court, viz.: Paragraph 842, A. R. S., as amended in 1891.

As originally enacted, the Revised Statutes of Arizona contained the following provisions, which might be considered applicable to this case:—

"837. All motions for new trials in arrest of judgment or to set aside a judgment shall be determined at the term of the court at which the motion shall be made." (A. R. S., 1887.)

"842. When a motion for a new trial is overruled, the party who files the motion may except to such ruling and embody the same in a bill of exceptions, as is provided by law in other cases, and the same shall be filed and become a part of the record of the cause, and the Supreme Court shall review such ruling on appeal or writ of error." (A. R. S., 1887.)

In 1891, paragraph 842, A. R. S., was amended to read as follows:—

"When upon motion a new trial be denied the clerk shall enter the ruling on the minutes of the Court, and such ruling shall be deemed to have been excepted to by the party making the motion and the Supreme Court shall review such ruling on appeal or writ of error if carried to said court, in manner as provided by chapters 17 to 19 of said title 20. And in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be denied and all questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exception thereto reserved and entered on the minutes of the Court."

In 1890, the Supreme Court of Arizona, in the case of *Ruff* v. *Hand*, 24 Pac. 257, decided that paragraph 837, A. R. S., operated to discharge a motion for new trial by operation of law at the end of the term at which the motion was made.

It was argued in the Territorial Court by opposing counsel that the amendment of 1891 simply allowed an appeal from the judgment rendered by paragraph 837, A. R. S., but no point was made to the effect that paragraph 842 of itself operated to deny the motion for a new trial. But as the Supreme Court of Arizona rendered no opinion in this case it is necessary to consider both paragraph 837, A. R. S., and paragraph 842, A. R. S.

SPECIFICATIONS OF ERROR.

1. That the Court erred in construing paragraph 837, Revised Statutes of Arizona (1887), as mandatory and operating of itself to deny the motion for a new trial, whereas the same should have been construed as directory only, and that the statute did not deprive the District Court of jurisdiction to hear and determine the motion for a new trial at the term to which the Court continued the same;

2. That the Court erred in construing paragraph 842, A. R. S., as operating of itself to enter a judgment

denying a new trial, for the same, at most, directs the Court to enter such a judgment;

3. That the Court erred in construing paragraphs 837 and 842, A. R. S., or either of them, as applicable to a case in which the delay in passing on the motion for a new trial is due to the Court and not to counsel, and neither of said paragraphs apply to a case where the motion for a new trial is continued by order of Court;

4. That the Court erred in construing paragraphs 837 and 842, A. R. S., as depriving the District Court of power to continue motions for a new trial;

5. That if paragraphs 837 and 842, A. R. S., correctly construed, be mandatory, and do by their own force operate to render an order denying a pending motion for a new trial upon the termination of the term at which the motion therefor is made, without any ruling by the Court and in the face of an order of the Court continuing the motion until the next term, the statutes are void on the ground that the same are an invasion of the judicial by the legislative power, and in conflict with the Organic Act of the Territory of Arizona, by which the legislative and judicial powers are separated;

6. That if paragraphs 837 and 842, A. R. S., correctly construed, be mandatory, and do attempt to deprive a defendant of a right to a new trial upon the termination of the term at which the motion therefor is made, without any ruling of the Court, and in the face of an order of the Court continuing the cause until

the next term, the statutes are void, being in conflict with section 33 of the Organic Act of Arizona, the same being section 1866, U. S. R. S., which provides:

"The jurisdiction, both appellate and original, of the courts provided for in section nineteen hundred and seven and nineteen hundred and eight, shall be limited by law."

STATUTES OF ARIZONA RELATING TO NEW TRIALS.

By chapter 18 of title XV of the Revised Statutes of Arizona (1887), the right to move for a new trial is granted in general terms. This chapter contains, among other provisions, the following paragraph:—

"837. All motions for new trial in arrest of judgment or to set aside a judgment shall be determined at the term of the Court at which the motion shall be made."

Paragraph 842 of this chapter also grants the right of appeal to the Supreme Court of the Territory from an order denying the motion for new trial and was as follows:—

"842. When a motion for a new trial is overruled, the party who files the motion may except to such ruling and embody the same in a bill of exceptions, as is provided by law in other cases, and the same shall be filed and become a part of the record of the cause, and the Supreme Court shall review such ruling on appeal or writ of error."

In 1891 this paragraph was amended and by the amendment a right of appeal was given from orders denying a motion for a new trial, based upon the ground that the motion for a new trial was not ruled upon during the term at which it was made.

The consideration of this amendment, is, however, postponed, as to determine the proper construction of a statute, the law as it stood at the time of the enactment of the statute, is to be regarded, but not amendments made subsequent to the adoption of the statute under consideration.

U. S. v. *Union Pac.*, 91 U. S. 72, 81.

I.

PARAGRAPH 837 OF THE REVISED STATUTES OF ARIZONA (1887), WHICH PROVIDES THAT "ALL MOTIONS FOR NEW TRIALS * * * SHALL BE DETERMINED AT THE TERM OF COURT AT WHICH THE MOTION SHALL BE MADE," IS DIRECTORY AND NOT MANDATORY.

Section 837 provides:

"All motions for new trials, in arrest of judgment or to set aside a judgment shall be determined at the term of the Court at which the motion shall be made."

This is a statute specifying the time within which a public officer (a judge) is to perform an official act regarding the rights and duties of others. Such statutes are uniformly held to be directory and not mandatory,

and on this point the opinions of the courts and text-writers coincide.

In Sutherland on Statutory Construction, the rule is laid down as follows:—

"Provisions regulating the duties of public officers and specifying the time for their performance, are in that regard, generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory unless the nature of the act to be performed or the phraseology of the statute is such that the designation of the time must be considered as a limitation of the power of the officer."

Sutherland on Stat. Con., sec. 448.

In Black on Interpretation of Laws, the same rule is laid down.

"When a statute specifies the time at which or within which an act is to be done by a public officer or body, it is generally held to be directory only as to the time and not mandatory unless time is the essence of the thing to be done, or the language of the statute contains negative words or shows that the designation of the time was intended as a limitation of power, authority, or right."

Black on Interp. of Laws, sec. 126.

In Endlich on Interpretation of Statutes, at section 436, the same rule is laid down, and in section 437 it is said:

"In general, statutes directing the mode of proceedings by public officers, are deemed advisory."

In the Am. & Eng. Ency. of Law (1st ed.), vol. 23, p. 458, it is said:

"Statutory prescriptions in regard to the time, form, and mode of proceedings by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity, and dispatch in the conduct of public business."

As the authorities upon this subject are almost without end, I will cite, at length, but a few of the cases in which statutes either identical with or substantially similar to the one under consideration, have been interpreted, and will cite, in most instances, but one case from any one State.

In *Rawson* v. *Parsons,* 6 Mich. 400, 404, the Supreme Court of Michigan construed a provision requiring a judge to render judgment not later than the first day of the term succeeding that upon which the cause was submitted, as merely directory, saying:

"We are all of opinion that this provision, as relates to the time within which the decision shall be given and filed, is directory merely. It imposes a duty upon the judge; but as the parties have no control over his action, it would be a harsh construction which should deprive them of the fruits of the litigation because the judge fails to decide by a particular day."

In *People* v. *Doe,* 1 Mich. 451, a statute requiring the judge to assign cases on the first day of the term was held merely directory.

Gomer v. *Chaffe,* 5 Colo. 383, is directly in point. In this case a motion was made to dismiss an appeal because, in contemplation of law, judgment had been entered denying the motion for a new trial, at the expiration of the term at which the motion was made, and that, therefore, the appeal was taken too late. The provision of the law claimed as operating to deny the motion at the expiration of the term was as follows:—

"Provided, always, the motion for new trial and decision thereon shall be made and had at the same term the findings were made or the decision rendered."

Extract from sec. 201, C. C. of Colo., 1877.

The Court said, p. 385:

"In our judgment, this section must be construed to be directory, so far as the action of the Court is required to be performed within a specified time.

"It is the duty of Courts to use all reasonable diligence in the decision of motions and other matters presented for their determination, but to say that they shall all be decided at the same term during which they are presented, regardless of their importance or difficulty, or of the time of submission, would be unreasonable. Section 203 of the Code requires the judge, upon granting or refusing a new trial, to state in writing the grounds upon which the same is granted or refused. This provision was doubtless intended to secure a careful consideration of such applications, as well as to in-

form litigants of the grounds of the decision. It not unfrequently happens that these motions are presented and argued or submitted upon briefs, on the last day of the term. In many instances they require a thorough review of the evidence, and they often involve the examination of authorities not previously brought to the attention of the Court. If the provision is to be held mandatory, the effect will be to require many of these motions to be decided without due consideration, a result which will defeat the spirit and intent of the statute."

In *Aspen Co.* v. *Billings,* 150 U. S. 31, the Court held equity rule 88, which provides that "no rehearing shall be granted (in certain cases) after the term at which the final decree shall have been entered and recorded," to be directory merely and not to deprive the Court of jurisdiction if the petition were filed in time.

In *Broad* v. *Murray,* 44 Cal. 228, section 632 of the Code of Civil Procedure, which provides:

"Upon the trial of a question of fact by the Court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision"

is held to be merely directory.

The case of *Pearce* v. *Strickler,* 49 Pac. 727, is almost identical with the case at bar.

There the rule provided that the motion for new trial must be argued, submitted, and decided at the term at which the case is tried, unless the Court expressly continue it, and that no continuance shall be for more than thirty days.

The lower court, however, failed to pass upon the motion within the time directed by the statute. The Supreme Court held the order made after the thirty days was valid, saying,

"A construction which would deprive the Court of jurisdiction of a motion while the Court was entertaining it would be highly penal and unwarranted by this rule."

Many authorities can be cited to the effect that statutes such as the one under consideration are purely directory. In the case of *Dominus Rex* v. *Ingram*, 2 Salk. 594, it is held that the failure of the magistrate to perform his duties within the time required by law did not determine his authority to perform them, and such has been the rule ever since.

The following cases from different States sufficiently show this to be the case:—

People v. *Cook*, 14 Barb. (N. Y.), 259, 290;
Gilleland v. *Schuyler*, 9 Kan. *569, *587;
Shaw v. *Orr*, 30 Ia. 355;
Bell v. *Taylor*, 37 La. An. 56;
Neal v. *Burrows*, 34 Ark. 491;
McCarver v. *Jenkins*, 2 Heisk. 629;
Boykin v. *State*, 50 Miss. 513;
McBee v. *Hoke*, 2 Speers, 138;
State v. *Carney*, 20 Ia. 82;
Huecke v. *Milwaukee*, 69 Wis. 401;
State v. *Pitts*, 58 Mo. 556;
State v. *Smith*, 67 Me. 328;

Ex parte Holding, 56 Ala. 458;
Wood v. *Chapin,* 13 N. Y. 559;
Gaston v. *Scott,* 5 Or. 48.

Reducing these general rules of construction to the specific case under consideration. In the Am. & Eng. Ency. Pl. & Prac., vol. 14, p. 902, the rule is laid down as follows:—

"Statutes requiring that the motion [for new trial] must be heard and determined at the term of the Court at which the findings are made or the verdict rendered, are construed as directory merely and do not deprive the Court of jurisdiction to determine the motion at subsequent terms."

This rule was laid down in *Gomer* v. *Chaffe,* 5 Colo. 383, already cited, and in the cases of *Larson* v. *Ross,* 56 Minn. 74, and *Gribble* v. *Livermore,* 64 Minn. 296, such statutes were construed as granting to the successful party a right to a speedy hearing, which must be asserted, but in no way as jurisdictional.

The only decisions which can be cited against the position for which we here contend, are found in the State of Texas, in which State it has been held that a statute relating to new trials, and similar to the one under discussion, is mandatory.

See

McKun v. *Ziller,* 9 Tex. 58;
Bass v. *Hays,* 38 Tex. 128.

and the decision of *Ruff* v. *Hand,* 24 Pac. (Ariz.), 257, upon which the judgment in this case is, apparently,

predicated. All that can be said of these decisions is that they are not controlling, contrary to all authority and in conflict with the general rule above contended for and not applicable to the peculiar facts of this case.

First, however, we maintain, on broad lines, and believe we have shown, that paragraph 837, A. R. S., (1887), is directory and not mandatory.

II.

PARAGRAPH 842 OF THE REVISED STATUTES OF ARIZONA DOES NOT OF ITSELF PURPORT TO RENDER A JUDGMENT DENYING THE MOTION FOR A NEW TRIAL AT THE EXPIRATION OF THE TERM AT WHICH THE MOTION IS MADE.

Paragraph 842, A. R. S., as amended in 1891, provides:

"When upon motion a new trial be denied the clerk shall enter the ruling on the minutes of the Court, and such ruling shall be deemed to have been excepted to by the party making the motion, and the Supreme Court shall review such ruling on appeal or writ of error if carried to said Court, in manner as provided by chapters 17 to 19 of said title 20. *And in case there shall be no ruling on said motion for a new trial during the term at which it was filed then said motion shall be denied and all questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exception thereto reserved and entered on the minutes of the Court.*"

The language of this paragraph does not purport to be self-executing. The paragraph merely directs that under certain circumstances a certain order shall be made by the Court, viz.: Upon no ruling being made upon the motion for a new trial at the term at which the same is made, then said motion shall be denied by the Court. This is no more than saying that in certain events the Court shall render a certain specified judgment. In order to render the paragraph operative itself to render the judgment or deny the motion, it would be necessary not only to distort its language but to add thereto. It is very obvious that it was the intention of the Legislature to allow the order denying a new trial to be reviewed by the Supreme Court of the Territory on appeal, yet clearly this could not be done unless the order reviewed were the order of a Court, as the Supreme Court has no power to review legislative judgments. And the refusal or neglect of a Court to act cannot be reviewed on appeal.

Green v. *Shumway,* 14 Pac. 863;
Chambers v. *Astor,* 1 Mo. 191.

It is also well settled that only judicial action can be reviewed by writ of error or appeal.

In *Gordon* v. *U. S.,* 117 U. S. 697-704, this Court, referring to an act of Congress purporting to grant to it appellate power over certain decisions of the Court of Claims that were not judicial in their nature, said:

"It is very clear that this Court has no appellate power over these special tribunals and cannot under

the constitution take jurisdiction of any decision upon appeal unless it was made by an inferior court exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court."

See, also, *Sanborn* v. *U. S.*, 27 Ct. of Cl. 485;
Hicks v. *Murphy*, 1 Miss. (Walker), 66;
Phelps Co. v. *Bishop*, 46 Mo. 68;
Ex parte Caldwell, 3 Baxter (Tenn.), 98;
Inhabitants of Weymouth, 56 Mass. 335;
Bower v. *Cook*, 39 Ga. 27.

It is clear, therefore, that in order to effectuate the latter portion of this section,—viz., to review the order denying a motion for new trial on appeal that this order must be a judicial order, and, as shown hereafter, no judicial order can be made by the Legislature,—it must be made by the Court. Yet, to review an order or judgment on appeal or writ of error, the order must be judicial. The dilemma here is complete. If the denial of the motion is a judicial act, the act is void under well-settled principles of law, as an interference by the Legislature with the judicial power. If, however, the denial of the motion for new trial is not a judicial act, then the same cannot be reviewed on appeal by the Supreme Court. We submit that no construction having these effects should be placed upon a statute which is equally susceptible of another and different construction.

But apart from this, a statute operating of itself to render a judgment or order without any action on the part of a Court, is an anomaly. (We believe the same to be unconstitutional, as shown later in this brief.) And we submit that no Court should place such a construction upon a statute unless required to do so by the language of the statute itself, but to do so in this instance is clearly erroneous. The statute provides:

" * * * And in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be denied and all questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exception thereto reserved and entered on the minutes of the Court."

The word *then,* as used in the act, means "in that event"; but if it be construed to mark the time at which the judgment or order shall be made, clearly it is but directory of the Court. To construe this act as itself operating to render the judgment is,

First—To defeat the very object of its passage, viz.: to allow appeals to the Supreme Court which had been cut off by the decision in *Ruff* v. *Hand,* for as there would be no judgment of the District Court, or any other Court, there could be no appeal to the Supreme Court;

Second—To convert an ordinarily worded statute into an anomalous piece of legislation, and

10469

Third—To change the words of the statute "shall be denied" into the words "is thereby denied." Apart from the constitutional questions involved, and hereafter discussed, such a construction as this is unwarranted and erroneous.

III.

IF, HOWEVER, THESE STATUTES, PARAGRAPHS 837 AND 842, BE REGARDED AS MANDATORY AND SELF-EXECUTING, THEY WOULD NOT APPLY TO THE CASE AT BAR, AS THE DELAY HERE WAS CAUSED BY THE ORDER OF THE JUDGE CONTINUING THE CAUSE, AND IS, IN NO WAY, ATTRIBUTABLE TO COUNSEL OR TO THE PLAINTIFF.

In the case at bar the motion for new trial was continued by the Court (see plaintiff's motion to dismiss), apparently on its own motion and for its own convenience, and as far as the first continuance was concerned, without objection of counsel on either side. Subsequently, and after appellant's time to appeal had expired and the jurisdiction of the Court had been divested—if the decision of the Supreme Court of Arizona be correct—counsel for respondent objected to the continuances which the Court continued to order, for reasons of its own, and not upon the request of appellant. These being the facts the maxim *"Actus curiæ neminem gravabit"* applies.

In *Evans* v. *Rees,* 12 Adol. & El. 167, it was held that though a rule requiring the entry of judgment within

a certain time was mandatory, yet as no laches were imputable to the party, the Court had power to enter the judgment *nunc pro tunc after the time had run.*

In *Freeman* v. *Tranah,* 74 E. C. L. 406, the same rule was under discussion, and the Court held that it could not order the entry of a judgment, as was done in *Evans* v. *Rees* unless the delay was occasioned by the Court itself, but fully approved that case, saying:

"The maxim *'Actus curæ neminem gravabit'* is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law."

Opinion of Creswell, J., p. 415.

In Elliott on Appellate Procedure, section 117, the effect of this maxim is considered with reference to statutes limiting the time within which appeals are to be taken, and the following rule is laid down:—

"It is said in general terms by the authorities to which we have referred, and by many more, that the time for taking an appeal can not be extended by agreement or by order of the Court, but, as we have shown, this rule, general and firmly settled as it is, does not always preclude an appeal and to the instances upon which it does not fully operate we add another of a different nature. Where the time is lost without the fault of the party and solely by reason of the action or non-action of the Court, the statute does not operate because the loss of time is not attributable to the acts of the parties. The rule that the delay or wrong of the Court shall not prejudice a party, rests upon the maxim 'An act of the Court shall prejudice no man.'"

In *Jackson* v. *Carrington,* 4 Exch. 41, this maxim was applied under the following circumstances:—

Plaintiff was under a peremptory undertaking to try the case at a particular sitting, and when the case came on for trial, applied for and was granted a postponement by the Court. On motion of defendant for an absolute rule for judgment, it was held that as the non-trial resulted from the action of the Court the rule would not be granted. This decision is quite close to the case at bar and illustrates the fact that where the delay arose, as in this case, from a continuance ordered by the Court, the case does not fall within the general rule.

The case of *Boody* v. *Watson,* 64 N. H. 169, S. C. 9 Atl. 794, is also in point. In this case a petition for a writ of mandate was filed within one year after an assessment was made, praying that a re-assessment be ordered. The statute gave the selectmen power to re-assess within one year after making the original assessment. The Supreme Court's decision was not made till after the year had passed. The Court held that as the petition was filed in time and the delay was due to the Court, the time lost by the action of the Court was not to be counted, saying (p. 814, Atl. R.):

"It is not denied that the plaintiffs were entitled to judgment when they brought this suit, and for ten months afterwards. The legal construction of statutes is the ascertainment of the fact of legislative purpose from competent evidence. *Edes* v. *Boardman,* 58 N. H. 580, 592; *Burke* v. *Concord R. R.,* 61 N. H. 160, 233; *State* v. *Hayes,* Id. 264, 330; *Sargent* v. *School*

District, 63 N. H. 528-530; 2 Atl. Rep. 641; *Whitney* v. *Whitney,* 14 Mass. 88, 92.) And upon sound principles of construction we cannot find the fact that the Legislature intended mere lapse of time should bar the plaintiffs' rights of action while it was in the custody of the law, and they could do nothing but wait for judgment. The intention of the Legislature was such that suits should be brought, and submitted to the Court for decision, and that judgments should be rendered for the reversal of such illegal exemptions. And the risk, on the one hand, of rendering judgment against the legal merits upon insufficient deliberation, and the certainty on the other hand, of a judgment entirely regardless of the merits if time were taken for their due consideration, would be a needless dilemma, that cannot be respectfully attributed to the purpose of the law-making power. The decision which the Legislature meant the Court should make is upon the merits, and after requisite investigation. * * *

"It is an old doctrine that things happening by an invincible necessity, though they may be against common law, or an act of parliament, shall not be prejudicial. 'When statutes are made, there are some things which are exempted and foreprized out of the provisions thereof by the law of reason, though not expressly mentioned. Thus things for necessity's sake, or to prevent a failure of justice, are excepted.' (Potter's Dwar. St. 123.) 'The law itself, and the administration of it, must yield to that to which everything must bend—to necessity. The law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling them to impossibilities; and the administration

of laws must adopt that general exception in the consideration of all particular cases.' (*The Generous,* 2 Dod. 322, 323; *Hall* v. *Sullivan R. R.,* 21 Month Law Rep. 138.) The general exception is a general rule of statutory construction.

"'As a general rule, when a duty *is at the proper* time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed, and is not destroyed by the lapse of the time within which in the first place the duty ought to have been done.' (*Lewis* v. *Commissioners,* 16 Kan. 102, 108.) * * *

"When a statute extending the term of a patent right provides that the right shall cease if it becomes vested, at any one time, in a certain number of persons otherwise than by devise or succession, an involuntary assignment in bankruptcy, being an act of the law, is an implied exception. (Dwar. St. 124.) In *Mattingly* v. *Boyd,* 20 How. 128, on a process of foreign attachment, the trustee was restrained from paying his debt by an order of Court. The suit abated by the plaintiff's death after the restraining order had been in force twenty-six years. During that time, the right of action of the trustee's creditor and the Statute of Limitation were suspended because the fund was in the control of the law. The intended exception of such a case, not expressed in the statute, was implied by the general rule of construction. * * *

"If there is a year's limitation of the corrective power it has been suspended in this case by the Court's deliberation, as it would have been during a delay caused by a belligerent closure of the Court, or the death or sickness of the judges, *or a continuance for argument on account of a press of judicial business. Actus curiæ*

neminem gravabit, is an application of the principle, *actus legis nemini facit injuriam.* (Broom, Leg. Max., 86, 89.) A continuance for advisement is an act of the law; and where a party dies after such a continuance and before judgment, the law can work out its scrupulous abstention from injury by imagining a judgment rendered at a former term, refusing to see in its own record explicit proof of the date, and finding in the fiction a mode of applying the rule, that its own act works no wrong. A mode of applying the rule without artifice would be found in an undisguised record of the adjudication that the judgment has the same effect as if it had been rendered before the party's death. If fictitious proceedings were needed for the application of the rule in this case, they would easily be supplied. The tax could be assessed by this Court in a judgment rendered as of December term, 1884. But the provision, implied by the ordinary statutory construction, against the requirement of an impossibility, and against the infliction of a wrong by an act of the law, can be administered without antedating the assessment. The law has kept on foot its superintending duty of correction while it continued the case for advisement, and withheld from the plaintiffs the judgment and process to which it had given them a good title, and for which it had invited and induced them to incur the expense of this suit. Their promised protection has been unavoidably delayed; but the law does not wantonly destroy the right which its promise has drawn into its judicial possession, and has no occasion to resort to any other than a straightforward mode of announcing and recording the date and effect of its jdugment."

In *Gray* v. *Brignardello,* 1 Wall. 627, 636, this Court said a *nunc pro tunc* order is always admissible when

the delay was occasioned through the act of the Court.

See also

Fishmongers Co. v. *Robertson,* 3 M. G. & S. 970.

In *Bell* v. *Bell,* 181 U. S. 175, 179, this Court said that the rights of a party should not be affected by a delay of the Court.

We believe, in view of the foregoing authorities, that even if paragraph 837, A. R. S., should be construed as mandatory, yet, as the delay in this case was occasioned by the act of the Court, the statute must be read as excepting from its operation such cases, and if this is not done, then the order of the District Court of the Territory denying the motion for a new trial must be considered as a *nunc pro tunc* order, and as the appeal was taken immediately upon the making of the same, it must be considered as having been taken in time. See

Elliott on Appellate Proceedings, sec. 117 (*supra*).

We now reach a question on the construction of these acts, which, in some lights, is a constitutional question, and yet should, we believe, be presented rather as a question of construction, viz.: Whether or not paragraphs 837 and 842, A. R. S., should be construed (supposing we are wrong in our prior contentions) so as to deprive the Courts of Arizona of the power to continue motions for new trials. Undoubtedly acts may be passed conferring a jurisdiction upon Courts so limited as to time that if the Court does not act within the time prescribed it cannot act at all. But it is equally clear that the acts

under consideration are not such acts. Paragraph 837, at most, but prescribes the time within which an act shall be done, and paragraph 842 but prescribes what judgment the Court shall enter. But we respectfully submit that this failure of the Court to act, contemplated by the statute, must, in some way, be attributable to the fault of the parties and does not include cases where the Court has so far acted upon the case as to expressly continue the same, for to so construe the statute is to deprive the Court of the power to regulate its own calendar and continue causes pending a power inherent in the Court itself.

IV.

SECTIONS 837 AND 842, A. R. S., DO NOT APPLY TO CASES IN WHICH THE HEARING OF THE MOTION HAS BEEN CONTINUED BY ORDER OF COURT.

The Courts of Arizona are created by Act of Congress, and it is too clear to require argument, that a Court created by Act of Congress cannot be shorn of its inherent powers by an Act of the Territory in which it is constituted.

If then, the power to grant a continuance, is an inherent power of the District Court of Arizona, paragraphs 837 and 842, A. R. S., must be and should be construed as excepting from their operation cases in which continuances have been ordered.

In 4 Am. & Eng. Ency. of Pl. & Prac., at page 825, the rule is laid down as follows:—

"The power to grant or refuse continuances is inherent in all Courts, and necessary for the promotion of justice and the prevention of delay."

In *Caswell* v. *Ward,* 2 Douglass (Mich.) 374, 375, the Court held that the power to continue a cause was clearly an inherent power of all Courts, saying:

"Is it not clear that the right to continue is an incident to the power to hear and determine causes like that under consideration? If not, it is certain that the grossest injustice might be done."

In *Burris* v. *Wise,* 2 Ark. 33, 41, the Court said:

"It has been correctly argued by the counsel for the appellant, that the power to grant or refuse continuancy, is a sound, discretionary, legal power, inherent in all Courts, and given for the express purpose of preventing delay and promoting the ends of justice."

In *Caughlin* v. *Blake,* 55 Ia. 634, 637, the Court said:

"The justice has the inherent power to continue the cause or suspend the trial until an executor may be appointed, and the proper parties may be brought before the Court."

In *Burt* v. *Williams,* 24 Ark. 91, the Court held that an act of the Legislature purporting to continue all cases then pending in the Courts of the State was void as it constituted an infringement by the legislative upon the judicial power.

Of course we do not wish to be understood to contend that the Legislature has not the power to prescribe what shall constitute sufficient cause to entitle a

party to a continuance. The power to make reasonable rules upon this subject is undoubted, but we do contend that the Legislature cannot take away from the Court the power to regulate its own calendar. The distinction here is the same as that drawn by the Supreme Court of California in the cases of *Spreckels* v. *Hawaiian Commercial Co.,* 117 Cal. 377, 381, and *Wright* v. *Superior Court,* Supreme Court of California, in Banc, June 26, 1903, where it is said:

"Certainly it [the Court] still has jurisdiction in all cases in equity notwithstanding these provisions of the Code [provisions limiting the right to injunctions to certain enumerated cases]. The trouble there is not that the Court has not jurisdiction which it has, but that the plaintiff, under the present law, cannot make a case which entitles him to relief."

Spreckels v. *Hawaiian Commercial Co.,* 117 Cal. 381.

In conclusion, on this branch of the case, we respectfully submit:

(1) That paragraph 837, A. R. S., is directory and not mandatory;

(2) That paragraph 842, A. R. S., is not self-executing and does not by its own force render a judgment.

(3) That if we are wrong in these contentions and the statutes be considered mandatory and self-executing, still neither paragraph 837 nor paragraph 842 have any application here, as the delay in this case occurred not through any fault or neglect of ours, but by the

action or inaction of the Court, and, therefore, the maxim *"Actus curiæ neminem gravabit"* applies;

(4) That neither paragraph 837 nor paragraph 842, A. R. S., apply to cases where the Court has expressly continued the cause, as to construe them to apply to such cases would be to place a construction upon the statutes rendering them unconstitutional, when they are susceptible of and demand a construction entirely unobjectionable.

Inasmuch as the Supreme Court of Arizona rendered no opinion in this cause, it has been necessary to consider whether or not its decision could be upheld under section 837, A. R. S., and if not, could it be upheld under section 842, A. R. S., as amended in 1891? We believe it is clear that section 837, A. R. S., cannot be considered as supporting the judgment, as that statute is purely directory, and further, that the peculiar facts of this particular case do not bring it within the purview of the act. We also believe it is equally clear that section 842, A. R. S., does not support the judgment because it is not self-executing and does not purport *"ex propria vigore"* to deny the motion for a new trial, but merely directs the Court to do so. And further, that it also is not applicable to the peculiar facts of this particular case. But assuming that we are in error in these contentions, it is clear that the judgment of the Supreme Court of the Territory is predicated upon the fact that one or the other of the provisions is itself operative to deny a motion for a new trial at the

end of the term at which the motion is made, regardless of the merits of the motion, and solely upon the ground that the Court has failed to pass upon the same and in the face of an order of the Court continuing the motion to a future day.

If this be the correct construction of either of these acts, we respectfully submit that the particular act by which this result is obtained is void, as such a statute violates the provisions of the Organic Act of the Territory in the following particulars:—

(1) It is an attempted exercise by the legislative power of functions purely judicial and confided only to the judiciary by the Organic Act of the Territory;

(2) It is an attempt to limit the jurisdiction of the District Court in a manner not permitted by section 1868, U. S. R. S.

V.

IF THE DECISION OF THE SUPREME COURT OF ARIZONA BE CORRECT AS TO THE INTERPRETATION OF THE STATUTES OF ARIZONA, THE STATUTES ARE VOID AS AN ATTEMPTED USURPATION BY THE LEGISLATURE OF THE JUDICIAL FUNCTIONS.

Organic Act.

By the Organic Act of the Territory of Arizona the judicial and legislative functions of government are separated. Section 1908, U. S. R. S., provides:

"The judicial power in Arizona shall be vested in a Supreme Court and such inferior courts as the legislative council may by law prescribe."

And by sections 1864 and 1865, U. S. R. S., the Supreme Court and District Court of the Territory are provided for and created.

Section 1866 provides:

"The jurisdiction, both appellate and original, of the Courts provided for in section nineteen hundred and seven and nineteen hundred and eight, shall be limited by law."

And section 1868 provides:

"The Supreme Court and the District Courts, respectively, of every Territory, shall possess chancery as well as common-law jurisdiction."

By section 1846 the legislative power of the Territory is vested in the Governor and Legislative Assembly. And in no part of the organic law does it appear that any judicial functions are given to that body.

From the foregoing provisions it seems clear that under the Organic Act of the Territory the judicial power is vested in the Supreme Court and District Court, and such other Courts as the Legislature may create (1908, 1864, 1865), and that the Supreme Court and District Courts of the Territory shall possess both chancery and common-law jurisdiction (1868), which jurisdiction, both appellate and original, shall be limited by law (1866). Whereas the legislative power is

vested in the Assembly and Governor. Clearly then it cannot be said that the Assembly and Governor can exercise any but legislative powers, as those are the only powers delegated to them.

It has been frequently decided that where, by the Constitution of the State the legislative power is entrusted to one branch of the government and the judicial power is confided to another, any act by the legislative power, judicial in its nature, is void.

In *Kilbourn* v. *Thompson,* 103 U. S. 168, 192, the question arose as to whether or not Congress possessed judicial powers other than those expressly granted by the Constitution. The Court, speaking by Mr. Justice Miller, said:

"The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred."

In *Butler* v. *Saginaw Co.,* 26 Mich. 22, 27, Judge Cooley laid down the rule as follows:—

"It is well settled that the apportionment of the legislative power to one department of the government will not authorize it to exercise any portion of the judicial power which is apportioned to another department. The apportionment is of itself an implied prohibition upon its exercise by the Legislature."

In fact it is well settled that the creation of a department for the exercise of the judicial power constitutes of itself a delegation to that department of all the judicial power of the sovereignty except as otherwise limited by the Constitution itself.

Greenough v. *Greenough,* 11 Pa. St. 489;
Alexander v. *Bennet,* 60 N. Y. 204;
Van Slyke v. *Ins. Co.,* 39 Wis. 390;
Cooley on Const. Law, p. 35.

The general principle being that a grant of general powers to one department of government impliedly excludes all other departments of government from the exercise of the powers granted to the first.

Cooley on Const. Lim. (6th ed.) 104;
Montesquieu Esprit des lois, p. 11, c. 6;
Story on Const., 518, 525.

In the case at bar the Legislature of Arizona has passed an act, which according to the Supreme Court of that Territory, of itself operates to deny a motion for a new trial while the same is pending before the Court. And, further, according to the statutes this legislative order is an appealable order and an appeal may be taken therefrom to the Supreme Court of the Territory, although no method is provided for the entry, recording, or authentication thereof.

This, we submit, is an anomaly. But to return to the question of the nature of an act rendering such a judgment or order.

A judgment has been defined as follows:—

"The official decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination."

Black's Law Dict.

"The decision or sentence of law given by a court of justice or other competent tribunal as the result of proceedings instituted therein for the redress of an injury."

3 Bl. Comm. 395;
Bouvier Law Dict.

It seems from the foregoing definitions that a judgment is in its nature an emanation from a judicial tribunal and that the rendition of a judgment is a judicial function.

In code States the distinction between an order and a judgment is that a judgment is the final determination of an action, whereas an order is the direction of a court or judge not included in the final determination of an action.

N. Y. Code, sec. 400.

It is clear, however, that both emanate from a judicial tribunal and are made in the course of a proceeding pending before it.

In the case at bar a motion addressed to a Court is denied, not by the Court, but by the Legislature without any action on the part of the Court, and the legislative judgment or order is reviewable on appeal as the

judgment or order of the Court. Clearly if the rendition of a judgment upon a motion pending in a Court is not a judicial function, no function can be considered as judicial, as the rendition of a judgment in accordance with the law is the province of the Court. As said by the Court in *Penn.* v. *Wheeling Bridge Co.,* 18 How. 440, "the judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case."

But here the law seeks of itself to apply the law. We have been able to find no case in which an interference with the judicial power has been carried to this extent, but the following decisions illustrate the fact that passing judgment upon proceedings pending in courts is beyond the powers of a legislative assembly:—

The Supreme Court of Tennessee has said:

"The powers of the State of Tennessee are vested in legislative, executive, and judicial departments, each separate and distinct from the other, with their powers and duties well defined by the Constitution, and by which each is kept within its appropriate sphere of action. The Legislature can make the law, but the courts must expound it and execute it, with the aid of the executive, when his action may become necessary for that purpose. The Legislature has no power to interfere with the administration of justice, either criminal or civil in the courts; a resolution that a criminal or class of criminals shall be discharged by the court, is then necessarily an assumption of power not war-

ranted. After conviction the Governor may pardon, but before conviction the Attorney-General and the Court are the only power that can discharge without acquittal, and this by *nolle prosequi.*"

State v. *Fleming,* 46 Am. Dec. 73, 74; 7 Humph. (Tenn) 152.

Or, as put by the Supreme Court of California in *Ex parte Schrader,* 33 Cal. 279:

"The distinction between legislative and judicial power lies between a rule and a sentence."

In the Tennessee case the judgment is made by the Legislature, and in no sense can the rendition of a judgment in any particular case or in all causes, be considered as a legislative function. Otherwise courts could be abolished and laws be self-executing.

Judge Field said in the Sinking Fund Cases, 99 U. S. 761:

"The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."

In *Jones* v. *Perry,* 10 Yerger (Tenn.) 59, (30 Am. Dec. 430, 432), the Court said:

"The Legislature can not sit in judgment, try causes, and apply the rules of law to them, make decrees, and much less can they make decrees in the exercise of an arbitrary power, independent of and in opposition to the rules of law."

Speaking of the validity of an act of the Legislature which attempted to grant a new trial, the Supreme Court of New Hampshire said:

"No particular definition of judicial powers is given in the Constitution; and considering the general nature of the instrument, none was to be expected. Critical statements of the meanings in which all important words were employed would have swollen into volumes; and when those words possessed a customary signification, a definition of them would have been useless. But 'powers judicial,' 'judiciary powers,' and 'judicatories,' are all phrases used in the Constitution; and though not particularly defined, are still so used to designate with clearness that department of government which it was intended should interpret and administer the laws. On general principles, therefore, those inquiries, deliberations, orders, and decrees which are peculiar to such a department, must, in their nature, be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employments of judicial and legislative tribunals. *The former decide upon the legality of claims and conduct; the latter make rules upon which in connection with the Constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases.* (Bac. Stat. 11; 2 Cranch, 272; 7 Johns. 498; *Dash* v. *Van Kleeck*, 5 Am. Dec. 291.) *In fine, the law is applied by the one, and made by the other. To do the first, therefore, to compare the claims of the parties with the laws of the land before established, is, in its nature, a judicial act.* * * The grant of a new trial belongs to the courts of law from immemorial usage. The power to grant a new

trial is incidental to their other powers. It is a judgment in relation to a private controversy, affects what has already happened, and results from a comparison of evidence and claims with the existing laws. It will not be denied that the consideration and decision by the Superior Court of the motion for this same new trial was an exercise of judicial power. If so, a consideration and decision upon the same subject by the Legislature must be an exercise of power of the same description; for what is in its nature judicial to-day must be judicial to-morrow and forever. The circumstance, also, that the Legislature themselves did not proceed to make a final judgment on the merits of the controversy between these parties, cannot alter the character of the act granting a new trial. To award such a trial was one judicial act, and because they did not proceed to perform another by holding that trial before themselves, the first act did not become any more or less a judicial one. We apprehend, therefore, that the character of the act under consideration must be deemed judicial. This position will probably be less doubted than the position that our constitution has not confided to the Legislature the power to pass such an act. But that power, if confided, must be exercised by the Legislature as a branch of the judiciary, or under some special provision, or as a mere legislative body."

Merrill v. *Sherburne,* 8 Am. Dec. 52, 56-58, 1 N. H. 199.

In a case arising in Rhode Island the validity of a statute granting a new trial in a cause under consideration in the courts was construed. The Supreme Court, referring to the act, said:—

"The judicial power is exercised in the decision of *cases;* the legislative, in making general regulations, by the enactment of laws. The latter acts from considerations of public policy; the former is guided by the pleadings and evidence in *the case.* Per Mr. Justice McLean. *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 Howard, 440. Indeed, laws and courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction; and our whole idea of judicial power is, the power of the latter to apply the former to the decision of those cases and controversies. To affect to decide, or to control the decision of, a case or controversy which has arisen at law or in equity, or to interfere with its progress, or to alter its condition in any way, is to assume the exercise of judicial power; and that, too, although the subject of the case or controversy might have been such in its nature, that the Legislature could have acted upon it, had it seen fit, without the aid of the courts. * * *

"But, without pursuing any further the cases illustrating what is, and what is not, judicial power, in a constitutional sense, we think that every one must admit that the Court of Common Pleas for the County of Providence, when, in the suits of the plaintiffs in this case against the Oneco Manufacturing Co., it attached, by its process, the property of that company in the hands of the defendants; received the affidavits of the latter, and upon the basis of them, and for the purpose of enforcing the attachment, gave judgment against the company; that, when, as the next step in the stated course of such proceeding, under our law, it entertained, heard with a jury, and took their verdict, found under its direction for the plaintiffs in this case, against

the defendants, as garnishees in the former suits, *it was* in the exercise of judicial power in the most rigid constitutional sense of the term. It was, in a matter placed by law within its jurisdiction, applying the established rules of that law to a case brought by the plaintiffs against the defendants, for the purpose of having the Court apply to it, and to enforce in their favor, those rules. To interfere with this jurisdiction; to disturb and control the exercise of this power in such a case; to take the case out of the settled course of judicial proceeding in that court; to set aside its verdict; to open its judgment; and to give the defendants leave to amend their affidavits, was, therefore, not only the exercise of judicial power on the part of the General Assembly over this court and case, but of judicial power of the most eminent and controlling character. * * * *Grant that the vote in question, so far as it dispensed with the general law applicable to this case, and made a new law for it, was remedial and legislative in its character, yet this, certainly, would not prevent it from being also judicial, so far as it set aside a verdict, and granted a new trial in a case pending in a court of law, or so far as it opened final judgments in such a court, and gave authority to the defendants to amend their old affidavits as garnishees, or to substitute new ones, nunc pro tunc in their place. That the General Assembly assumed judicial power in this case, that it might render efficient the application of its legislative power to it, does not render the former assumption less, nor the power assumed less, judicial in its nature and character, in the constitutional sense of that power."*

Taylor & Co. v. *Place*, 4 Rhode Island (1 Ames), 324, 337-340.

On the same subject the Supreme Court of Pennsylvania said:—

"If anything is self-evident in the structure of our government, it is that the Legislature has no power to order a new trial, or to direct the Court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the Legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them."

De Chastellux v. *Fairchild*, 53 Am. Dec. 570, 15 Penn. St. 18.

On the same subject the Supreme Court of Indiana said:—

"There is no section of the constitution permitting the Legislature to grant new trials. The granting of a new trial is a judicial act, and in this State controlled by settled rules of law. If an inferior court should in any given case exercise the power to grant new trials, in violation of these settled rules, this Court would set aside the grant, and leave the judgment rendered unaffected."

Young v. *State Bank*, 58 Am. Dec. 630, 631, 4 Ind. 301.

The foregoing authorities clearly show that the granting of a new trial is a judicial function, and that the Legislature cannot exercise such a power; we respectfully submit that, if the granting of a new trial is a judicial function, the denial of a new trial is equally a judicial function. All rulings on pending causes are

judicial acts. As was said by the Supreme Court of Tennessee:

"Who would be safe if the Legislature were permitted to dictate the decision of causes pending? What would be the use of courts under such a state of things? They would be mere instruments in the hands of others; and all their powers and usefulness would be paralyzed. They might make records and issue process; but the mind and independence would be gone, and with these would also go responsibility, for if the agent be not free to act, there should not be accountability; hence arises the great necessity of courts looking to their own constitutional rights and powers, and firmly disregarding all attempts at innovation upon them. Admit the principle that the Legislature at pleasure can take from or add parties in causes pending, and how can the Court look forward to results?"

Officer v. *Young*, 26 Am. Dec. 268, 269, 5 Yerger (Tenn.), 301.

"Whenever an act of the Assembly, therefore, is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right, which is not a legislative but a judicial function. * * *

"The only sense in which that transaction cannot be called judicial is that no court of justice could have pronounced the judgment under the existing laws upon the state of facts in this case. To have authorized such a sentence by a court, further legislation would have been necessary. It is true, then, that the act is not purely judicial. But this is all that can be said in

support of it. It is certainly as true that it is not purely legislative."

Hoke v. *Henderson,* 25 Am. Dec. 675, 686-687, 4 Devereux's Law, 1.

In *Saunders* v. *Cabaniss,* 43 Ala. 173, the Supreme Court of Alabama held an act attempting to grant new trials to be void as an infringement by the legislative upon the judicial powers.

In Sedgwick on Statutory and Constitutional Law, pp. 166-167, it is said:—

"The Legislature is to confine itself to making laws and cannot make decrees."

Judge Cooley says:—

"The legislative power extends only to the making of laws and its exercise is limited and restrained by the Federal and State Constitutions."

Cooley's Constitutional Limitations, p. *91.

In the case of *Marpole* v. *Cathers, Admr.,* 78 Va. 239, an act directing a court to grant new trials and to open judgments recovered after its passage for purely arbitrary reasons, was held unconstitutional, as an invasion by the legislative upon judicial function, and it was further held that the fact that the act was prospective and that the contract upon which the judgment was rendered was entered into after its passage did not in any way affect the matter.

The preceding cases clearly show that the Legislature has not the power to grant a motion for a new trial in any particular case. These decisions, however,

are not based upon the theory that such an act, confined to a particular case, is special legislation, but, on the contrary, go upon the view that the granting or refusing of a new trial is a judicial act. This being so, they are in point, as the fact that the Legislature has undertaken to deny motions for new trials in a class of cases does not make the nature of the legislative act denying a motion for a new trial any the less a judicial act. As said by the Supreme Court of New Hampshire:—

"That which is in its nature judicial to-day must be judicial to-morrow and forever,"

Merrill v. *Sherburne, supra.*

and that which is judicial in one case is judicial in all cases. So, by making the act general in its operation, in this respect the Legislature has not changed its nature, but only enlarged its scope.

The act condemned in *Marpole* v. *Cathers, Admr.*, 78 Va. 239 (*supra*), was a general act prospective in its view, but this did not save it, as the Legislature had required the Court to grant new trials for arbitrary reasons in no way connected with the cases under consideration; just as in this case a new trial is denied on similar grounds.

It would seem, therefore, that unless Legislatures possess the power to render judgments this act is void, and further, and altogether apart from this, in so far as the legislative act purports to render a judgment denying a motion for a new trial irrespective of the merits of the controversy, it is for this reason alone

void. So, even if it were mandatory to the Court, and were construed with this exception—as the Supreme Court of Arizona has construed it—it is condemned by the rule laid down by *Marpole* v. *Cathers, Admr.* (*supra*), as it directs a new trial to be denied for reasons having nothing to do with the merits of the case, and upon the happening of events without the control of either party.

It seems obvious that even as directing a legislative judgment, if such a thing were permissible, the act in question is void, as the Legislature could not predicate its judgment upon facts which it could not lawfully make the basis of a judicial decree.

VI.

IF THE CONSTRUCTION PLACED BY THE SUPREME COURT OF ARIZONA UPON PARAGRAPHS 837 AND 842 BE CORRECT, THESE STATUTES ARE VOID, BEING IN CONFLICT WITH SECTION 1866, U. S. R. S., THE SAME BEING SECTION 33 OF THE ORGANIC ACT OF ARIZONA, WHICH SAID STATUTE PROVIDES:—

"The jurisdiction, both appellate and original, of the courts provided for in sections nineteen hundred and seven and nineteen hundred and eight shall be limited by law."

By the Organic Act of the Territory of Arizona, the judicial power, as heretofore shown, is vested in the Territorial Courts.

Section 1868, U. S. R. S., provides:—

"The Supreme Court and the District Courts, respectively, of every Territory, shall possess chancery as well as common-law jurisdiction."

Section 1866 provides:—

"The jurisdiction, both appellate and original, of the courts provided for in sections nineteen hundred and seven and nineteen hundred and eight shall be limited by law."

Section 1908 provides:—

"The judicial power in Arizona shall be vested in a Supreme Court and such inferior courts as the legislative council may by law prescribe."

This last provision, though not specifically mentioning District Court, is not to be construed as excluding the same.

Ex parte Lathrop, 118 U. S. 113-117.

This is made very clear by section 1868, which endows the District Courts with both chancery and common-law jurisdiction. The District Courts are, therefore, by section 1868, granted common law and chancery jurisdiction, and by section 1866 this common law and chancery jurisdiction "shall be limited by law."

The meaning of this phrase "shall be limited by law" has already been fixed by this Court in the case of *Ferris* v. *Higley,* 20 Wall. 375. In this case the question arose as to whether an act of Utah conferring general common law and chancery jurisdiction upon a probate

court was valid. It was contended that this legislation was authorized by section 1868, U. S. R. S., and that the phrase "shall be as limited by law" meant such law as might be enacted by the Territorial Legislature. The Court held that the phrase "shall be as limited by law" referred not to such law as might be enacted by the Legislature, though that might sometimes be included, *but to the organic act itself and to the general history of our jurisprudence.* Mr. Justice Miller, in delivering the opinion of the Court, saying (p. 383):

"It is supposed that a sufficient answer to this course of reasoning is found in the declaration of the ninth section of the organic act already cited, that the jurisdiction of the several courts therein provided for, 'shall be as limited by law.' The argument is that this refers to laws to be thereafter made by the Territorial Legislature, and that as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in deciding what law is meant in this phrase 'as limited by law,' we are wholly to exclude laws made by the Legislature of the Territory. There may be cases when that Legislature conferring new rights, or new remedies, or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by Territorial statutes within the limit of the general idea of the nature of probate courts or that certain duties not strictly of that character may be imposed on them by that legislation.

"But we hold that the acts of the Legislature are not the only law to which we must look for the powers of any of these Territorial Courts. The general history of our jurisprudence and the organic act itself are also to be considered and any act of the Territorial Legislature inconsistent with the latter must be held void. We are of opinion that the one which we have been considering is inconsistent with the general scope and spirit of that act in defining the courts of the Territory, and in the distribution of judicial power amongst them, inconsistent with the nature and purpose of a probate court as authorized by that act and inconsistent with the clause which confers upon the Supreme Court and District Courts general jurisdiction in chancery as well as at common law. The fact that the judges of these latter courts are appointed by the Federal power, paid by that power—that other officers of these courts are appointed and paid in like manner—strongly repels the idea that Congress, in conferring on these courts all the powers of courts of general jurisdiction, both civil and criminal, intended to leave to the Territorial Legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the Territory."

It is true that in Arizona, owing to the peculiar phraseology of section 1908, jurisdiction concurrent with that of the District Court may be conferred by the Territorial Legislature upon other courts. (*Ex parte Lathrop,* 118 U. S. 113.) But in this case the Legislature has cut down the powers of the District Courts and so limited the time within which it may

rule upon motions for a new trial pending before it so as to wrest from that Court the power to determine motions for new trial upon their merits, and compels the Court to render—or by force of its own acts renders—a judgment upon a motion pending in that Court upon principles purely arbitrary. For here a motion for new trial is denied, not upon its merits, not upon failure of the moving party to make his motion in due time and to present it to the Court, but upon the failure or inability of the Court to pass upon the same within an unreasonably short time.

The grant of common law and chancery jurisdiction to the District Court certainly gives to that Court power to hear and determine motions for a new trial.

The origin and history of the practice of granting new trials is obscure, principally on account of its antiquity. Bouvier says:

"The origin and practice of granting a new trial is concealed in the night of time."

Bouvier's Law Dict., New Trial.

Speaking on the same subject, Blackstone says:

"The exertion of these superintendent powers of King's Courts in setting aside the verdict of a jury and granting a new trial on account of misbehavior of the jurors is of a date extremely ancient. There are instances in the Year Books of the reigns of Edward III, Henry IV, and Henry VII of judgments being stayed (even after trial in bar) and new venires awarded because the jury had eaten and drank without consent of

the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. * * *

"The maxim at present adopted (in relation to new trials) being this, that in all cases of moment, where justice is not done upon the trial, the injured party is entitled to another trial."

Blackstone, book III, 387-388.

In Graham & Waterman on New Trials it is said, as early as 1351, a *venire de novo* was directed for the misbehavior of a jury.

The silence of the early reports on this subject is accounted for by Lord Hardwicke in *Queen* v. *Bewdley,* 1 P. Wm. 207, 213, wherein he said:

"One reason why we do not find this practice more ancient may be that there are no old reports of motions."

The fact, however, is clear that the practice of granting a *venire de novo* is very old and the difference between the grant of a *venire facias de novo* and a new trial was that in the former was generally only granted for matters appearing in the record, whereas a new trial was granted for matters outside of the record and a *venire de novo* issued thereon. See

Witham v. *Earl of Derby,* 1 Wils. 48, 56.

In our practice a *venire de novo* is nothing more than a new trial in a cause in which the verdict or judgment is erroneous in matters of law.

U. S. v. *Hawkins,* 10 Pet. 125, 131.

There has been considerable dispute as to the origin of awarding a *venire de novo* for grounds outside of the record. The first reported case in which this practice was pursued is that of *Wood* v. *Gunton,* Michaelmas, 1665, Sup. Style, 466. In this case Glynn, Ch. J., said:

"It was in the discretion of the Court in some cases to grant a new trial but this must be a judicial and not an arbitrary discretion, *and it is frequent in our books for the courts to take notices of miscarriages of juries and to grant new trials upon them.* And it is for the people's benefit that it should be so, for a jury may sometimes by indirect dealings be moved to side with one party and not be indifferent betwixt them, but it cannot be so intended of the Court."

In *Bright* v. *Eynon,* 1 Burr. 391, 393, 394, Lord Mansfield, referring to the right of new trial as a common-law right, said:

"Trials by jury in civil cases could not subsist now without a power somewhere to grant new trials. * * Most general verdicts include *legal consequences,* as well as propositions of fact; in drawing these consequences, the jury may mistake, and infer directly contrary to law. * * *

The parties may be *surprised* by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. * * *

If *unjust* verdicts, obtained under these and a thousand like circumstances, were to be conclusive forever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely *necessary to justice,* that there should, upon

many occasions, be opportunities of reconsidering the cause by a new trial."

It is clear from the foregoing authorities that the right of a party to move for a new trial and the power of the Court to determine such motion was well established at common law prior to the American Revolution. It seems clear, therefore, that when common-law jurisdiction was granted by the organic act to the District Court of the Territories, this grant carried with it the power to hear and determine motions for new trials as that was a well-recognized power of common-law Courts at the time of the grant of such power.

As said by the Supreme Court of New Hampshire: "The grant of a new trial belongs to the courts of law from immemorial usage. The power to grant a new trial is incidental to their other powers."

Merrill v. *Sherburne,* 1 N. H. 199.

This being so the Territorial Legislature cannot divest the Court of this power, but here it has done so in a roundabout, but most effectual, way, by depriving the Court of time within which to pass upon the motion and by its own act (according to the Territorial Supreme Court) deciding the motion absolutely irrespective of the merits of the case.

In the case at bar the motion for new trial was called for hearing within the period prescribed by the Arizona Statutes, to wit: the day before the last day of the term at which the motion was made. The motion was continued by the Chief Justice, before whom it was

called. According to the decision of the Supreme Court of the Territory the power of the District Court to itself determine the motion was limited in this case to twenty-four hours—a clearly unreasonable limit.

In conclusion on this point, we submit that the Legislature of Arizona has not power to curtail the jurisdiction of the District Courts by limiting the time within which that Court can pronounce judgments on matters pending before it and within the jurisdiction conferred upon it by the Revised Statutes and particularly so when the time limit prescribed was highly unreasonable, as it was in this case.

We further contend that section 1868, U. S. R. S., prohibits legislation of the character here under discussion, by which laws are made self-operating so as to render judgments in matters pending before the Courts without any action on the part of the Court.

In conclusion we submit that the acts of the Territorial Legislature under discussion in this case are, if reasonably construed, valid and in no way opposed to the organic act, but that if the construction placed upon these acts by the Supreme Court of the Territory is adhered to they must be condemned as violating the organic act in the particulars pointed out.

Respectfully submitted,

THOS. B. BISHOP,
Attorney for Appellant.

BISHOP, WHEELER & HOEFLER, AND
J. F. BOWIE,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

JAMES G. JAMES, APPELLANT,

v.

GEORGE H. APPEL, APPELLEE.

No. 108.

BRIEF OF APPELLEE.

The specifications of error in the appellant's brief vary very materially from his assignment of errors filed in the Supreme Court of the Territory of Arizona, and we submit that any errors not assigned in the court below are waived and should not be considered on this appeal. The only specification of error in the brief which was assigned below is the fifth, which corresponds to the third error assigned below. The sixth specification in the brief has a material variance from the second error assigned in the Arizona court, the latter referring to an alleged provision of the organic act of Arizona that "A jurisdiction of the courts shall be as limited by law," while the provision, as set out in the sixth specification in the brief is that: "The jurisdiction * * * shall be

limited by law." The first four specifications of error in the brief are not based upon anything in the assignment of errors filed below. However, to enable the court, should it see fit to review all of the specifications of error in the brief, we will take them up in their order.

Statement of Facts.

The statement of facts embodied in the appellant's brief contains several misstatements, no doubt unintentionally, which we feel obliged to correct. For instance, on page two of the brief, he states: "This motion (the motion for a new trial) was called for hearing on the 30th day of March, 1900, which was the day before the last day of the term at which the motion was made and the judgment rendered, and was on that day continued for hearing by order of the court until the next term of the court." The motion was not called for hearing on the 30th day of March, nor on any other day of that term, nor was any hearing had of the motion at that term, nor did appellee or his counsel have any notice or knowledge of the continuance until after the end of the term, as we shall show more fully later. Relying upon the statement of facts certified by ex-Chief Justice Street and by Chief Justice Kent, of which we have a copy before us, we also submit that appellant is in error in stating that the motion "was on that day continued for hearing by the order of the *court*." Paragraph four of the statement of facts by the Chief Justices shows that the order was made "by the Honorable Webster Street, Chief Justice of the Supreme Court of the Territory, and Judge presiding, etc.," "by chamber order entered of minutes," so that the order of continuance was made, not by the court, but by the judge in chambers. And that judge was not

the judge of the district court in which the case was tried but was the judge of a different district who had been called in to try this case during the absence of the presiding judge of the court in which the case was tried (Judge Davis).

Appellant's statement of facts continues: "At each succeeding term, the motion was called for hearing and at each term it was so called it was on each occasion continued until the next term, the judge assigning as a reason for the continuance 'that the Honorable Webster Street, etc.'" The impression given by this statement is that the reason quoted was assigned for the first continuance, but that is not true, no reason whatever having been assigned for the first continuance.

The statement on page five of the brief as to the points that were and were not made in the territorial court by appellee is incorrect. The theory of the appellee in the Supreme Court of Arizona was the same as that which will hereafter appear in this brief, except that as no question was raised in the Arizona court as to the validity of the Arizona statutes involved, the appellee, of course, made no argument on that point.

The statement on page seven of appellant's brief that "Paragraph 842 of this chapter also grants the right of appeal to the Supreme Court of the Territory from an order denying the motion for a new trial," is incorrect. There is no right of appeal under the laws of Arizona from an order denying a new trial, the only appeal being from a final judgment; although, on such appeal from the final judgment, the court is required by paragraph 842 to review the ruling on the motion for a new trial.

Spicer *v.* Simms, 57 Pac. 610.

Appellant makes a similar error at the top of page eight of his brief in stating that the amendment of 1891 gives

a right of appeal. That amendment only gives a right to have the questions raised by the motion for a new trial *reviewed* on appeal from final *judgment*.

I.

Paragraph 837 of the Revised Statutes of Arizona (1887) is Mandatory and not Directory.

The appellant's quotations from text-books as to the rule for construing statutes specifying the time within which a public officer is to perform an official act are of little value in interpreting this statute. While, of course, within the broadest meaning of the term "public officer," a judge is such an officer, yet a court is not, and an examination of the authorities cited will show that they had in mind officers who were performing ministerial duties and not tribunals exercising judicial functions. Of the cases quoted by appellant, *Rawson* v. *Parsons* (6 Mich. 400) and *Broad* v. *Murray* (44 Cal. 228), construe statutes requiring the decision or judgment in a cause to be rendered within a particular time and hold such statutes to be directory. Such a construction of such statutes was, of course, absolutely necessary in order to prevent a denial of a litigant's right to a determination of his suit, to hold otherwise would result in leaving many cases pending in court and undecided indefinitely, or result in their dismissal without default of plaintiff. The same is true as to *People* v. *Doe* (1 Mich. 451).

Gomer v. *Chaffe* (5 Colo. 383), while more like the case under consideration, turned upon another provision of the code requiring "the judge, upon granting or refusing a new trial, to state in writing the grounds upon which the same is granted or refused." This other section of the

Code convinced the court that section 201, requiring motions for new trials to be decided in the same term in which the judgment was rendered, was not mandatory but directory. Arizona has no such statute requiring the grounds of granting or refusing a new trial to be stated in writing, or stated at all, so that the reason for the Colorado decision does not exist in Arizona. *Aspen Co.* v. *Billings* (150 U. S. 31) and *Pearce* v. *Strickler* (49 Pac. 727) involve the construction, not of a statute, but of a rule of court, to which very different principles must be applied. A court may adopt rules to govern its proceedings with discretionary power to deviate from them where their application would be injurious or impracticable.

Grayson *v.* Virginia, 3 Dall. 321.

"And it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it."

U. S. *v.* Breitling, 20 How. 252.

In the New Mexico case the rule of court bore no resemblance to the statute in question here, as it provided that the court might expressly continue the motion. We are of the opinion that it is not within the power of courts to accomplish by rule what, as we expect to show under a different assignment of error, has been done by this statute. The legislature has an undoubted authority to limit by law the times within which courts shall have jurisdiction to do particular things, but a court cannot enlarge or restrict its own jurisdiction or the jurisdiction of inferior courts by the adoption of a rule.

18 Enc. P. & P. 1241.

In *Hudson* v. *Parker* (156 U. S. 277) it was said:

"This court cannot, indeed, by rule enlarge or restrict its own inherent jurisdiction and powers or those of the

other courts of the United States, or of a justice or judge, or either, under the Constitution and laws of the United States."

And, in the same case, it was explained that the statutory power of this court to make rules was "for the orderly conducting of business" in all the courts of the United States, and to "prescribe the form of writs and other process." The power of this court in making rules for the district and circuit courts would probably not extend to depriving them of jurisdiction to grant a new trial, for instance, if such jurisdiction existed by law. Moreover, the court, in *Aspen Co.* v. *Billings*, followed the opinion of Mr. Chief Justice Field in *Giant Powder Co.* v. *Cal. V. P. Co.* (6 Sawy. 508), that "Equity Rule 88 applies only where no petition is presented during the term." That alone shows that the construction of Rule 88 can have no bearing on the construction of this Arizona statute, which has no application except where the motion is presented during the term.

The long list of cases beginning with *People v. Cook*, which appellant cites (pages 13 and 14 of his brief), without quotation, explanation or comment, requires no comment from us, except that none of them have any application.

The passage quoted from 14 Enc. P. & P. 902 is based upon the single case of *Gomer v. Chaffe*, which we have already considered. On the same page of the same volume of this Encyclopædia, appears the following:

"Abandonment.—Failure to obtain ruling in time.—If the motion is not disposed of during the statutory time, it will be regarded as denied or overruled."

The same volume of the same work, on page 897, says:

"A motion for a new trial may be continued to succeeding terms like other motions or proceedings, UNLESS THE STATUTE REQUIRES SAID MOTION TO BE HEARD DURING THE TRIAL TERM."

To support the proviso which we have put in capitals, the Encyclopædia cites in the notes, besides the Texas cases hereinafter referred to:

Vallentine *v.* Holland, 40 Ark. 338.
Walker *v.* Jefferson, 5 Ark. 23.
Doddridge *v.* Gaines, 1 MacArthur (D. C.) 335.
England *v.* Duckworth, 74 N. Car. 309.
Kane *v.* Burrus, 2 Smed. & M. (Miss.) 313.

In the cases of *Larson* v. *Ross* (56 Minn. 74) and *Gribble* v. *Livermore* (64 Minn. 296), the statute under consideration is not quoted, and both cases are decided upon the ground that the party opposing the motion appeared at the subsequent term and argued the motion on its merits, without first objecting to the appeal, and thereby waived the objection. In the latter case the court added:

"Whether the objection would be well taken if made in the court below, we need not consider."

To determine the true construction of Section 837, it is necessary to consider its history. At the time of the adoption of the Revised Statutes of Arizona in 1887, the majority of the bar of the Territory, as well as its Code Commission, were Texas lawyers, and were familiar with the Texas practice and with the interpretation which had been given it by the Texas courts. The Commission which prepared the Code of 1887, adopted the Texas practice act with almost no variation and, among other provisions, adopted from Texas this Section 837 that: "All motions for new trials in arrest of judgment or to set aside

a judgment shall be determined at the term of the court at which the motion shall be made." This section is the same, word for word, as Article 766 of Hart's Digest of the Texas Code. The effect of the paragraph had been determined by the Supreme Court as early as 1852 in *McKean* v. *Ziller* (9 Tex. 59) which was a case absolutely on all fours with the case at bar. The court said:

"It is insisted that the statute is but directory, and that it was within the power of the court to postpone to the next term and then act upon the motion for a new trial. We cannot so regard it. We think the mandate of the law is peremptory and must be obeyed; and that at the end of the term the motion, not having been acted on, was discharged by operation of law.

"The suspending of the judgment was consequent upon the continuance of the motion. The one was but incidental to, and was dependent upon, the other. But the judge, not having the legal authority to continue the motion, the order for that purpose, and that made dependent upon it, were alike void.

"It is true that the court has control over and, for good cause, may alter or vacate its judgments during the term; but, in this case, the court did not set aside or vacate the judgment during the term. It could do so afterwards only by an original proceeding, instituted for that purpose, setting forth equitable grounds sufficient to entitle the party to a rehearing." (*Goss* v. *McClaran*, 8 Tex. R.)

In 1853 a similar decision was made in *Bullock* v. *Ballew* (9 Tex. 498), and in 1855 in *Laird* v. *State* (15 Tex. 317). In 1873, in *Bass* v. *Hays* (38 Tex. 129), the court cites *McKean* v. *Ziller*, and says: "This decision has been followed by this court without a known exception, and must now be considered as the established law of the State." In *Wilcox* v. *State* (31 Tex. 587) the same rule was applied to criminal cases. After the adoption of the

Arizona code, the same rule has been laid down in Texas in *Carter* v. *Commissioners* (12 S. W. 985) and in many later cases.

The statute having been adopted from Texas, it was adopted with the interpretation which had been given to it by the courts of Texas, and even if this court should be disposed to consider that interpretation wrong, looking at it as a case of first impression, it will, under these circumstances, be bound by the Texas decisions. The object of construction and interpretation is to ascertain the intent of the legislature, and there can be no doubt that, by Section 837, the Arizona legislature meant what the Texas courts had held for thirty-five years to be the meaning of the language adopted. In adopting and enacting a foreign statute decisions expounding it are adopted with it.

Tucker *v.* Oxley, 5 Cranch. 42.
Pennock *v.* Dialogue, 2 Pet. 18.
Cathcart *v.* Robinson, 5 Pet. 280.
McDonald *v.* Hovey, 110 U. S. 628.
Brown *v.* Walker, 161 U. S. 600.
Henrietta Mining Co. *v.* Gardner, 173 U. S. 130.

The case last cited is one involving the construction of an Arizona statute adopted from the State of California, and the court says:

"The language of paragraph 40, as amended in 1891, having been taken from the California code, it is presumed that it was taken with the meaning it had there."

Constrained by the Texas decisions, as well as by its own interpretation of the law, the Supreme Court of Arizona, in *Ruff* v. *Hand* (24 Pac. 257), held as follows:

"Paragraph 837, Rev. St. 1887, requires that a motion for a new trial shall be determined at the term when the motion is made. The requirement of the statute is mandatory. If a motion for a new trial be not acted upon during the term, it is discharged at the end of the term by operation of law. McKean *v.* Ziller, 9 Tex. 58. The remedy, in such a case, is to apply to the court for action upon the motion before the end of the term. Laird *v.* State, 15 Tex. 317. The notice of appeal must be made during the term, and the bond on appeal must be filed within 20 days after the term at which the final judgment is entered. These requirements must be strictly complied with to give this court jurisdiction."

We are profoundly convinced that, independent of any construction by the courts of Texas, the decision in *Ruff* v. *Hand* and in this case gives a correct interpretation to Section 837. There must be no comparison between this statute and statutes requiring judgments to be entered within a particular time, because the latter, if mandatory, would tend to defeat and delay justice, because it would sometimes be impossible to decide cases on due consideration within the time, and no judgment could be rendered at all. But the effect of a mandatory construction of paragraph 837 is quite the contrary. Before paragraph 837 can take effect a judgment must already have been rendered, and its effect is to make that judgment final and put an end to the litigation, surely a beneficial result. The effect of our interpretation is that at the end of the term in which the judgment is rendered the trial court loses control and jurisdiction over the judgment, except upon a direct proceeding brought for the purpose of attacking, but, although an end is thus put to the litigation in the trial court, the defeated party is not thereby concluded. He can still obtain a review by an appeal to the supreme court. It is not conducive, either to justice

or to the settlement of estates and controversies, that a trial court should have the power to prolong indefinitely the question whether its own judgment should be set aside or not.

II.

We are not disposed to dispute the statement which appellant places in capitals at the head of the argument under his second specification of error on page fifteen of his brief, which is as follows:

"Paragraph 842 of the Rev. St. of Arizona does not of itself purport to render a judgment denying a motion for a new trial at the expiration of the term at which the motion is made."

In the first place, the denial of a new trial is an order and not a judgment, although appellant's counsel, by his constant repetition of the word "judgment" in that connection, seems to endeavor to accustom our minds to that novel idea. But, of course, paragraph 842, as amended in 1891, does not purport to render a judgment or make an order of any kind. Such is not the province of a law. What it does do is to provide that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed" then the lapse of the term shall *ipso facto* result in the denial of the motion.

The construction which appellant contends for results in an utter absurdity. He says, on page sixteen of his brief:

"The paragraph merely directs that under certain circumstances a certain order shall be made by the court, viz: Upon no ruling being made upon the motion for a new trial at the term at which the same is made, then said motion shall be denied by the court."

But a denial by the court is a ruling, and counsel's contention amounts to this: That upon no ruling being made a ruling shall be made. As the time referred to by the word "then" is at the end of the term, it would be impossible for the court to determine whether the conditions upon which he was to deny the motion existed until after his power to deny was gone.

A further absurdity is involved in this. Paragraph 842, as amended, goes on to say: "All questions that may have been raised thereby shall be subject to review by the supreme court AS IF SAID MOTION HAD BEEN OVERRULED," meaning that the denial effected by the lapse of the term should have the same effect as an overruling in term by the court. But, if we adopt the construction which appellant attempts to force upon the statute, that is, that it is a direction to the court to deny the motion, the clause we are now considering would have no meaning, for it would be equivalent to saying that the court should overrule the motion, and then all questions should be subject to review, etc., as if said motion had been overruled.

The argument that the supreme court of the Territory could not review the order denying a new trial under our theory because it would be a "legislative judgment" is based upon the unwarranted theory that such denial would be a "legislative judgment." The dilemma which the appellant thinks he finds is the product of his own ingenious manufacture, and at once disappears upon a clear view of the statute and its effect. The amendment of 1891 does not attempt to give a right of appeal from the motion for a new trial as the appellant supposes, but only provides that "ALL QUESTIONS THAT MAY HAVE BEEN RAISED THEREBY SHALL BE SUBJECT TO REVIEW BY THE SUPREME COURT AS IF SAID MOTION HAD BEEN OVERRULED," etc. "If said motion had been overruled," there could be no ap-

peal from an order overruling. The only appeal is from the final judgment which had been rendered before the motion for a new trial was even filed, but on that appeal from the final judgment the supreme court is given jurisdiction to review "all questions that may have been raised" by the motion for a new trial. The law of Arizona on this subject is fully and clearly explained by the Supreme Court of Arizona in *Spicer* v. *Simms, supra.*

But the Act of 1891, amending paragraph 842, was not necessary to justify the court's action in dismissing the appeal, which must have been the same even if that Act had not been passed. The Act of 1891 was passed after the decision of *Ruff* v. *Hand*, and was passed because of that decision. It was not intended as an additional restriction upon the granting of new trials, but was intended rather for the benefit of the party seeking a new trial. Under the law as it stood before 1891, the lapse of the term without a ruling on the motion amounts to an abandonment of the motion, so that the issues raised thereby could not be passed upon by the appellate court. It was to remove the only hardship caused by the law, as it thus stood, that the Act of 1891 provided that such lapse of the term should be equivalent to a denial of the motion, thus giving the defeated party the right to a review by the supreme court of all questions raised by his motion. In addition to that effect of the Act of 1891, however, it does recognize and confirm the construction put upon paragraph 837 by the courts of Texas and Arizona.

III.

The present counsel for appellant is (we hope) misinformed as to the facts which he attempts to set out in his third specification of error. The first continuance of the

motion for a new trial was made without the knowledge of appellee or his counsel, and at the urgent solicitation of counsel for the appellant. Mr. Chief Justice Street, who made the order, informed appellant's counsel at the time that he made it that he did not believe he had the authority or power to continue the motion, but that, if appellant insisted, he would make it in order that the question might be brought before the Supreme Court of Arizona, and gave appellant's counsel distinctly to understand that he was taking the continuance at his peril. The appellee and his counsel did not discover that the first continuance had been made until some weeks after the end of the term and, as soon as they learned of it, protested against it. The third order was made while Mr. Hazzard, one of appellee's attorneys, chanced to be present in court, and he then and there objected and protested. To all the objections and protests of appellee's counsel, Mr. Justice Davis replied that he was not passing upon the legality of the orders, but made them solely at the request of Judge Street. The entire program of continual continuances was a part of the consistent policy of the defendant below to delay the execution of the judgment. That delay was the only purpose of the defendant in procuring the continuances became evident when, after a delay of nearly two years, Mr. Chief Justice Street came from Phoenix to Tucson to decide the motion. The motion for a new trial was then submitted to the court without argument or suggestion on the part of appellant or his attorneys, and no argument was ever made before the trial court upon the merits of the motion for a new trial. Counsel for appellee did not argue the merits because they took the position that the trial court had no jurisdiction of the motion; but they did argue their motion to vacate the orders of continuance, and Mr. Chief Justice

Street stated from the bench that he had made the orders at request of appellant's counsel and at appellant's peril, and declined to express any opinion on the arguments advanced by counsel for the appellee on the motion to vacate the orders of continuance, saying that whatever might be his own opinion of the questions of jurisdiction he would deny the motion for a new trial and let the supreme court pass upon the questions. That Mr. Justice Davis's attitude in making the orders of continuance at the request of Mr. Chief Justice Street was as we have stated is proven by the fact that he concurred in the dismissal of the appeal by the supreme court. The present attempt of appellant to assume the position that the continuances were made by the court of its own motion and without laches on the appellant's part is outrageous. For the reasons we have stated, the maxim "*Actus curiæ neminem gravabit*" is very far from being applicable to this case.

IV.

We cannot believe that the argument made under this specification of error will be taken seriously. Because the power to grant a continuance is an "inherent power," it seems to be contended that a statute must not be construed as prescribing any limitation as to the conditions, time, or manner for the exercise of that power. When courts and text-books say that the power to grant continuances is inherent they mean that express statutory authority for granting them is not necessary, not that the power cannot be limited by express enactment. All of the authorities cited by appellant are dealing with the question of continuance of the trial of a cause which is still pending in court, not with the continuance of a motion for new trial filed after judgment has been rendered,

though we have no doubt that in the absence of statutory limitation, a court could, without express statutory authority, continue a motion for a new trial.

The point here involved, however, is conclusively determined by the decisions in *McKean* v. *Ziller* and *Bullock* v. *Ballew*, cited above, both of which were decided by the Supreme Court of Texas before the adoption of the Texas statute by Arizona, and in both of which continuance for the term was ordered precisely as in this case.

V.

The proposition that the legislature of Arizona cannot exercise the judicial powers which have been vested in the courts will not be disputed by us, but we deny that either paragraph 837 or paragraph 842, as amended in 1891, is open to that objection. As we have pointed out before, counsel is confused by his misapprehension of the meaning and effect of paragraph 842. It is not true that that section, as he supposes (page 33 of brief) "of itself operates to deny a motion for a new trial while the same is pending before the court." What it does is to provide that the lapse of the term shall operate to deny the motion. Neither is it true, as assumed on the same page of appellant's brief, that "according to the statutes this legislative order is an appealable order," nor that "an appeal may be taken therefrom to the supreme court of the Territory." No appeal is given from the order, and it has never been supposed, in Arizona, that the order is appealable. As we have already pointed out and as is decided in *Spicer* v. *Simms*, *supra*, no appeal could be taken at that time nor at any time before the adoption of the Revised Statutes of 1901 from anything except the final judgment of the court. But, if such appeal were taken from the final

judgment, then the Act of 1891 required the supreme court to review not the order denying a new trial, but "all questions that may have been raised thereby."

The cases cited by appellant in this specification of error have not the slightest tendency to sustain his position, and the passages quoted from them clearly determine the question in our favor. For instance, nothing could prove more clearly that the laws in question were proper legislative enactments and not judicial than the following quotation from Justice Field in the Sinking Fund case:

"The distinction between a judicial and legislative act is well defined. The one determines what the law is and what the rights of parties are with reference to transactions already had, the other prescribes what the law shall be in future cases arising under it."

These laws, passed in 1887 and in 1891, "prescribed what the law should be" in this case, which arose under it in March, 1900. Nor could anything be stronger in our favor than this, quoted by appellant from *Young* v. *State Bank* (4 Ind. 301):

"The granting of a new trial is a judicial act, and in this State controlled by settled rules of law. If an inferior court should in any given case exercise the power to grant new trials, in violation of these settled rules, this court would set aside the grant, and leave the judgment rendered unaffected."

A law, as distinguished from a sentence, judgment, or decree, "establishes rules that shall regulate and govern in the matters or transactions occurring subsequent to the legislative action."

6 A. & E. Ency. P. & P. (2d Ed.) 1032.

The constitutionality of a statute providing that a judg-

ment shall be entered in certain cases has been expressly decided in Wyoming. In *Barkwell* v. *Chatterton* (33 Pac. Wyo. 940) a statute provided that:

"The change of venue shall be deemed abandoned unless the applicant shall, within the ten days, &c., * * * if the abandonment is by the plaintiff, the cause shall be considered discontinued and the costs taxed against the said plaintiff and a judgment therefor rendered; and if the abandonment is by the defendant, he shall be adjudged in default."

That statute was assailed by the plaintiff as unconstitutional in being "an assumption of judicial power by the legislature." The counsel for plaintiff contended—

"If the legislature can direct a certain judgment to be rendered in this case, it may exercise that prerogative in all cases; and the courts then will perform merely perfunctory duties as an agency of the legislative department,"

to which the court replied:

"As to this, it is only necessary to say that the law in question is a general law, and that it was passed a long time before this controversy arose."

Surely it is not an encroachment on the judicial power to provide that litigation must at some time have an end. After a judgment has been rendered upon a full hearing, it could hardly be considered an encroachment upon the judicial power if the trial court were denied altogether the right to change its decision.

"A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital.

Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect. It not infrequently happens in this, as in all other courts, that decisions are announced and judgments entered on the last day of the term, and too late for the presentation or consideration of any petitions for rehearings or motions for a new trial. Will anyone seriously contend that a judgment thus entered is entered in defiance of the requirements of due process of law, and that a party having been fully heard once upon the merits of his case is deprived of the constitutional protection because he is not heard a second time?"

Railway Company *v.* Backus (154 U. S. 421).

All of the authorities and arguments in this assignment of error that have any application at all apply only to paragraph 842, and have no application to paragraph 837, for the latter does not purport to deny a motion, nor have that effect, nor, under it, does the lapse of the term have that effect. Under all of the decisions, both of Texas and Arizona, the effect of paragraph 837 was that, on the expiration of the term, the motion "was discharged by operation of law." Although the Act of 1891, amending paragraph 842, did clearly confirm and sanction the decision in *Ruff* v. *Hand*, yet its main purpose was to make it possible to have the questions raised by the motion for a new trial reviewed on the appeal where the appellant was unable to secure a ruling on his motion before the expiration of the term. If the amendment to paragraph 842 is void, paragraph 837 still stands and justifies the dismissal of the appeal. That being true, it is immaterial whether the Act of 1891 is void or not, and for that reason this court will not determine whether it is void or not. As was said in *Wayman* v. *Southard* (10 Wheat. 46):

"The difference of the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes, the law * * * the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not enter unnecessarily."

VI.

The statement of appellant on page forty-six of his brief that the meaning of the phrase in Section 1866 of the Revised Statutes of the United States has been determined by this court in the case of *Ferris* v. *Higley* (20 Wall. 375) is based upon a misapprehension so strange that it is almost incredible. It would seem that the most superficial glance at the official report of that case where the acts of Congress involved are fully set out before the opinion would show that an entirely different act of Congress was under construction. The act there considered was an act passed by Congress on September 9, 1850 (9 Stat. at Large, 453): "To establish a territorial government for Utah." A part of section 9 of the Act is quoted in the official report, as follows: "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace shall be as limited by law." "SHALL BE AS LIMITED BY LAW." The part which we have written in capitals is also in capitals in the official report of *Ferris* v. *Higley*. Appellant appears to have confused this statute so conspicuously placarded before him with Section 1866, R. S., U. S., which provides that the jurisdiction of the Territorial courts "shall be limited by law." The word "as" is a small word, but its use or omission makes so great a difference in the effect of the law that we are astonished that appellant's counsel should have overlooked it.

"Shall be as limited by law," of course, refers to the law as it existed when the Act was passed, but "shall be limited by law" cannot mean that. It is a command to somebody to limit the jurisdiction of the courts by law. A command to whom? Not to Congress, for a command by Congress addressed to itself would be superfluous and it would have been simpler to insert the limitations in the Act then being passed than for Congress to command itself to make such limitations thereafter. It cannot be addressed to any other than that legislative power which by the same chapter Congress has declared "shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." This is a grant of power to the legislature, and not a restriction upon its power. It is more. It is a command to the legislature to pass laws limiting the jurisdiction, both appellate and original, of the territorial courts. It is in obedience to that command that the legislature has passed paragraph 842. The distinction between section 1866 and language similar to that in the Organic Act of Utah is considered and demonstrated in *Greeley* v. *Winsor* (48 N. W. 214). But, even if the language of 1866 were the same as that passed on in *Ferris* v. *Higley*, it would have no bearing on this case. While, in one sense, the question involved in this case is one of jurisdiction of the trial court, that is, its jurisdiction to entertain a motion for a new trial after the expiration of the term, yet, in its essence, it is not a case of jurisdiction in the sense in which that word is used in *Ferris* v. *Higley*, but a case of practice. The statutes in question do not attempt to limit the jurisdiction of the courts, so far as the subject-matter which may be brought before them for determination is concerned, but only to prescribe the times and conditions under which that jurisdiction shall be exer-

cised. As was said by this court in *Bent* v. *Thompson* (138 U. S. 114) where an appeal was made to the authority of *Ferris* v. *Higley* to support the contention that the practice and procedure of the common law touching matters of probate were in force in New Mexico: "It may be said that that case relates only to the jurisdiction and not to the practice of these courts."

"Whenever Congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor and has committed to the territorial assembly full power, subject to a few specified or implied conditions of supplying all details of legislation necessary to put the system into operation even to the defining of the jurisdiction of the several courts. * * * Of course, in case of any difficulties arising out of this state of things, Congress has in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper."

Hornbuckle *v.* Toombs, 18 Wall. 648.

We confess that we are little interested in appellant's investigations into the ancient origin of the practice of granting new trials, for we think the whole subject immaterial in this case. Whether it began under the common law or under the Mosaic Code, makes no difference. Appellant has cited no authority denying the legislature power to limit or restrict the granting of new trials, nor even to abolish new trials altogether. It is not a question of jurisdiction, but of practice. "Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings."

Railway Co. *v.* Bachus, *supra.*

"If one hearing is not due process of law, doubling it cannot make it so."

Montana Co. *v.* St. Louis M. & M. Co., 152 U. S. 160.

Nor can it even be said that the lapse of the term, without a ruling on the motion, deprives the defeated party of a new trial. It deprives the trial court of the right to give it to him, but he can still go to the supreme court for it on appeal.

At the close of his brief, counsel for appellant repeats the misstatement which he made at the beginning, that the motion for a new trial was called for hearing before the end of the term at which the motion was made. It was never called for hearing until the day it was denied. Counsel is mistaken also in saying that, "According to the decision of the supreme court of the Territory, the power of the district court to itself determine the motion was limited in this case to twenty-four hours." The fact as shown by the statement of facts is that the trial court had from the 11th day of January, 1900, when the motion was filed, until the 30th day of March, 1900, in which to determine the motion.

In conclusion, we call the court's attention to the fact that paragraph 837 was passed in 1887, and has been in force for sixteen years. Paragraph 842, as amended in 1891, has been in force for more than twelve years. Paragraph 837 came into the code of Arizona clothed with judicial interpretations already thirty-five years old, yet no act of Congress has been passed disapproving or annulling it, and our best argument as to the effect of that failure to annul is the quotation of the following language of this court:

"In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the Territory to transmit to that body copies of

all laws on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

Clinton *v.* Englebrecht, 13 Wall. 434.

This same paragraph was quoted in full and with approval by this court in a case appealed from Arizona.

Camon *v.* United States, 171 U. S. 277.

HEREFORD & HAZZARD,
Attys. for Appellee.

C. W. HOLCOMB,
W. C. KEEGIN,
J. H. McGOWAN,
Of Counsel.

Supreme Court of the United States.

No. 108.—October Term, 1903.

James G. James, Appellant, vs. George H. Appel. } Appeal from the Supreme Court of the Territory of Arizona.

[January 4, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona dismissing an appeal because taken too late. The appellees recovered a sum from the appellant in the court of first instance, and after judgment was entered the appellant moved for a new trial. The judge who tried the case, being unable to attend, made an order in chambers continuing the motion to another term. At a later term, after several similar continuances, the motion was overruled, and the appellant then appealed to the Supreme Court of the Territory. These events took place before the passage of the Arizona Revised Statutes of 1901. (See par. 1479.) It is assumed that the appeal was too late if the judgment became final at the term when it was rendered, Revised Statutes of Arizona, 1887, par. 849, and we may assume further that the ground of dismissal was the paragraph of the Revised Statutes, requiring that motions for new trials "shall be determined at the term of the court at which the motion shall be made," R. S. 1887, par. 837, and the further provision of par. 842. By the latter, as amended in 1891, "when upon motion a new trial is denied," a review by the Supreme Court is provided for, and it then is enacted that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed then said motion shall be denied and the questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exceptions thereto reserved and entered on the minutes of the court." Acts of 1891, No. 49, p. 69.

The Arizona par. 837 is copied from a similar section in the Texas code. Act of May 13, 1846, § 112, Hart's Dig. Texas Code, Art. 766, 1 Sayles, Texas Civil Stats., Art. 1372. Long before its adoption in Arizona the latter section had been construed in Texas as mandatory and as discharging a motion by operation of law if not acted upon at the same term. It was held to put it out of the power of the court to postpone the motion for a new trial to the next term and then to act upon it. If the requirement could

be avoided by a continuance it would be made almost nugatory. *McKean* v. *Ziller*, 9 Tex. 58; *Bullock* v. *Ballew*, 9 Tex. 498; *Bass* v. *Hays*, 38 Tex. 128. When a statute is taken in this way from another, even a foreign, State, it generally is presumed to be adopted with the construction which it has received. *Tucker* v. *Oxley*, 5 Cranch, 34, 42; *Henrietta Mining and Milling Co.* v. *Gardner*, 173 U. S. 123, 130; *Commonwealth* v. *Hartnett*, 3 Gray, 450. See *Coulam* v. *Doull*, 133 U. S. 216. On this ground as well as that of the meaning of the words, the act had been construed as in Texas by the Supreme Court of Arizona. *Ruff* v. *Hand*, 24 Pac. Rep. 257. In view of the history of the section we shall spend no more time upon the question. Even were it more doubtful, we are of opinion that the amendment of 1891 to par. 842 makes the meaning plain. The words "then [necessarily after the end of the term] said motion shall be denied," show that the motion is disposed of at the end of the term. Furthermore they do not mean that an order must be made out of term because of the failure to make an order within it, but mean that the motion shall be barred by the lapse of time, adopting the decision of the year before in *Ruff* v. *Hand*, and save an exception as if the motion had been denied by the court. The amendment assumes or enacts that the motion is to be deemed overruled at the end of the term, and has for its object to give the party an exception in case he appeals from the judgment, so that the propriety of granting the motion may be reviewed along with the other matters brought before the Supreme Court. See *Spicer* v. *Simms*, 57 Pac. Rep. 610.

It is urged that at least the statute cannot be meant to operate when the postponement is for the convenience of the court, and the case is likened to those where a judgment or order is entered *nunc pro tunc* in order to prevent a loss of rights through a delay caused by the court itself. But there is no need of an exception in such a case. The party's rights are saved but transferred for consideration to a higher court, and were it otherwise we should hesitate to read the exception into such absolute words.

It is said that by the foregoing construction the legislature attempts an unconstitutional assumption of judicial functions. But this is a mistake, both in form and substance. In form because the legislature does not direct a judgment but merely removes an obstacle to a judgment already entered. (We need not consider whether a different construction would be adopted if the statute dealt with the time for entering judgments.) In substance, because we no more can doubt the power of the legislature to enact a statute of limitations for motions for a new trial than we can doubt its power to enact such a statute for the bringing of an action. It may be questioned whether there would be any constitutional objection to a law making the original judgment final and doing away with new trials altogether. "Rehearings, new trials are not essential to due process of law, either

in judicial or administrative proceedings." *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Backus*, 154 U. S. 421, 426. See *Montana Co.* v. *St. Louis Mining & Milling Co.*, 152 U. S. 160, 171. The statute did not deal with the past or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules. Whether the attempt to grant a review of the motion in case of an appeal or writ of error was valid is not before us. But certainly it does not seem an extraordinary stretch of legislative power to say that if the right to have a motion considered is lost in the lower court by lapse of time, the motion may be considered on appeal. There is no judgment by the legislature but simply a qualification of the time limit if the case goes up.

Finally, it is argued that the sections construed as we construe them are inconsistent with the grant of common law jurisdiction to the courts by Congress. Rev. Stat. §§ 1868, 1908. It is said that the right to grant new trials was a well recognized incident of common law jurisdiction, and that it cannot be taken away or cut down by the territorial legislature. In view of the provision in § 1866, that the jurisdiction given by § 1908 "shall be limited by law," and indeed apart from it, we should hesitate to say that the territorial legislature was prevented by the grant of common-law jurisdiction, in general words, from doing away with new trials altogether. A rule of practice like this does not touch jurisdiction in any proper sense. *Perris* v. *Higley*, 20 Wall. 375, cited by the appellant, has no application. Apart from other differences, that was a case of an attempt to confer original jurisdiction in civil and criminal cases, both in chancery and common law, upon the probate courts. We certainly see nothing to prohibit the local legislature from making this not unusual or unreasonable rule. See *Hornbuckle* v. *Toombs*, 18 Wall. 648; *Burt* v. *Thompson*, 138 U. S. 114; *Greeley* v. *Winsor*, 1 So. Dak. 618, 631.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.